

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,)
) CR-18-00258-EJD
 PLAINTIFF,)
) SAN JOSE, CALIFORNIA
 VS.)
) MAY 23, 2022
 RAMESH "SUNNY" BALWANI,)
) VOLUME 33
 DEFENDANT.)
) PAGES 6418 - 6504

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE EDWARD J. DAVILA
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: UNITED STATES ATTORNEY'S OFFICE
BY: JOHN C. BOSTIC
JEFFREY B. SCHENK
150 ALMADEN BOULEVARD, SUITE 900
SAN JOSE, CALIFORNIA 95113

BY: ROBERT S. LEACH
KELLY VOLKAR
1301 CLAY STREET, SUITE 340S
OAKLAND, CALIFORNIA 94612

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER:
IRENE L. RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

1 A P P E A R A N C E S: (CONT'D)

2 FOR DEFENDANT BALWANI: ORRICK, HERRINGTON & SUTCLIFFE LLP
3 BY: SHAWN ESTRADA
4 THE ORRICK BUILDING
 405 HOWARD STREET
 SAN FRANCISCO, CALIFORNIA 94105

5 BY: JEFFREY COOPERSMITH
6 AARON BRECHER
7 701 FIFTH AVENUE, SUITE 5600
 SEATTLE, WASHINGTON 98104

8 BY: STEPHEN CAZARES
9 77 SOUTH FIGUEROA STREET, SUITE 3200
 LOS ANGELES, CALIFORNIA 90017

10 BY: AMY WALSH
11 51 W 52ND STREET
 NEW YORK, NEW YORK 10019

12 ALSO PRESENT:

13 PROLUMINA
14 BY: CHRISTIAN
 2200 SIXTH AVENUE, SUITE 425
 SEATTLE, WASHINGTON 98121

15 UNITED STATES POSTAL INSPECTION SERVICE
16 BY: CHRISTOPHER MCCOLLOW

17 FEDERAL BUREAU OF INVESTIGATION
18 BY: MARIO C. SCUSSEL

19 UNITED STATES FOOD & DRUG
20 ADMINISTRATION
21 BY: GEORGE SCAVDIS

22

23

24

25

SAN JOSE, CALIFORNIA

MAY 23, 2022

P R O C E E D I N G S

(JURY OUT AT 8:36 A.M.)

(COURT CONVENED AT 8:36 A.M.)

THE COURT: THANK YOU FOR YOUR COURTESY.

LET'S GO ON THE RECORD IN THE BALWANI MATTER.

ALL COUNSEL ARE PRESENT. MR. BALWANI IS PRESENT.

WE ARE OUTSIDE THE PRESENCE OF THE JURY TO TAKE UP A
MOTION THAT WAS CALENDARED.

ALL RIGHT. LET'S TALK ABOUT DOCUMENT 1440, WHICH IS THE
GOVERNMENT'S MOTION TO EXCLUDE LIS RELATED TESTIMONY AND
EVIDENCE; THE OPPOSITION IS 1448; AND THE REPLY IS 1454.

I HAVE THOSE IN FRONT OF ME. THANK YOU.

LET ME FIRST HAVE YOU STATE YOUR APPEARANCE, PLEASE.

MS. VOLKAR: GOOD MORNING, YOUR HONOR.

KELLY VOLKAR ON BEHALF UNITED STATES.

THE COURT: THANK YOU. GOOD MORNING.

MR. BRECHER: GOOD MORNING, YOUR HONOR.

AARON BRECHER FOR MR. BALWANI, WHO IS PRESENT IN THE
COURTROOM, ALONG WITH MY COLLEAGUES.

THE COURT: THANK YOU. GOOD MORNING.

THIS IS THE GOVERNMENT'S MOTION TO EXCLUDE LIS RELATED
TESTIMONY AND EVIDENCE BY MR. SONNIER, SONNIER?

MR. BRECHER: SONNIER. THANK YOU, YOUR HONOR.

THE COURT: MR. SONNIER. MR. SONNIER WAS AN EXPERT

08:38AM 1 THAT THE DEFENSE RETAINED.

08:38AM 2 SO AS I UNDERSTAND IT, THE DEFENSE WOULD LIKE TO PUT THIS
08:38AM 3 WITNESS ON AS AN EXPERT TO TESTIFY ABOUT SQL, I THINK IT IS,
08:38AM 4 AND ABOUT THE ABILITY -- THIS WITNESS'S OPINION THAT THE
08:38AM 5 DATABASE COULD HAVE BEEN REASSEMBLED AND OTHERWISE BEEN MADE
08:39AM 6 PRODUCTIVE.

08:39AM 7 IS THAT WHAT HE'S GOING TO DO?

08:39AM 8 MR. BRECHER: IN GENERAL TERMS, YOUR HONOR, YES.

08:39AM 9 THE COURT: LET'S TALK SPECIFIC TERMS.

08:39AM 10 MR. BRECHER: THAT'S WHAT I WAS TURNING TO,
08:39AM 11 YOUR HONOR.

08:39AM 12 MR. SONNIER IS AN EXPERT IN SQL, I BELIEVE IT IS COMMONLY
08:39AM 13 PRONOUNCED SQL SERVER DATABASES, DATA ENCRYPTION, AND DATA
08:39AM 14 RECOVERY. THE SUBSTANCE OF HIS ANTICIPATED TESTIMONY CLOSELY
08:39AM 15 TRACKS THE DECLARATION THAT IS ALREADY ON FILE AS
08:39AM 16 DOCUMENT 1158.

08:39AM 17 THE COURT: SO WHEN YOU SAY, "CLOSELY TRACKS," I
08:39AM 18 WANT TO BRING YOU BACK TO SPECIFICS, PLEASE.

08:39AM 19 MR. BRECHER: SO WHAT MR. SONNIER WOULD SAY IS --
08:39AM 20 FIRST OF ALL, WE WOULD LAY -- WE WOULD ESTABLISH THE CONTEXT
08:39AM 21 FOR WHAT HAPPENED HERE, THAT THERE WAS A COPY THAT WAS
08:39AM 22 DELIVERED TO THE UNITED STATES GOVERNMENT.

08:39AM 23 THAT COPY WAS ENCRYPTED. THAT ENCRYPTION KEY WAS NOT
08:39AM 24 PROVIDED. NO ONE, SO FAR AS WE CAN TELL, HAS BEEN ABLE TO OPEN
08:39AM 25 IT, AND WE DON'T SEE ANY PROSPECTS OF ANYONE BEING ABLE TO OPEN

08:39AM 1 IT.

08:39AM 2 BUT WHAT MR. MR. SONNIER IS GOING TO SAY IS DESPITE THAT
08:39AM 3 FACT, AND DESPITE THE DISASSEMBLY OF THE LIS SYSTEM
08:39AM 4 ARCHITECTURE FOUR DAYS LATER, THAT WOULD NOT HAVE PREVENTED THE
08:40AM 5 GOVERNMENT FROM SEIZING THE ORIGINAL SERVERS AND DRIVES AND
08:40AM 6 REASSEMBLING THE LIS UNDER WHICH -- OH, PLEASE, YOUR HONOR.

08:40AM 7 THE COURT: SO THIS IS WHERE I WOULD LIKE TO CUT TO
08:40AM 8 THE CHASE SO TO SPEAK.

08:40AM 9 MR. BRECHER: SURE.

08:40AM 10 THE COURT: HE CAN TESTIFY ABOUT, FROM YOUR
08:40AM 11 PERSPECTIVE, ABOUT HIS VAST KNOWLEDGE ABOUT THE SQL, AND HOW,
08:40AM 12 IN HIS OPINION, "EVEN IF IT WAS DISASSEMBLED, LADIES AND
08:40AM 13 GENTLEMEN, IT ACTUALLY COULD BE REASSEMBLED." AND HE WOULD
08:40AM 14 TALK ABOUT THAT BASED ON HIS UNIVERSE OF KNOWLEDGE.

08:40AM 15 BUT ARE YOU ALSO TELLING ME THAT YOU WOULD ASK HIM
08:40AM 16 QUESTIONS ABOUT THE GOVERNMENT'S HANDLING OF THE -- WHATEVER
08:40AM 17 THEY HAD?

08:40AM 18 MR. BRECHER: YES AND NO, YOUR HONOR.

08:40AM 19 I SUPPOSE TO YOUR QUESTION, I BETTER BE SPECIFIC TO MAKE
08:40AM 20 SURE THAT I'M CLEAR ON WHAT WE'RE SAYING.

08:40AM 21 THE COURT: RIGHT.

08:40AM 22 MR. BRECHER: I DON'T SEE THAT MR. SONNIER WOULD BE
08:40AM 23 ASKED QUESTIONS ABOUT THE GOVERNMENT'S HANDLING OF THE
08:40AM 24 ENCRYPTED COPY, OTHER THAN TO PROVIDE SOME FACTUAL CONTEXT FOR
08:40AM 25 THE JURY TO UNDERSTAND THAT THERE WAS THIS COPY PROVIDED, BUT

08:41AM 1 IT WAS INACCESSIBLE THROUGH NO FAULT OF THE GOVERNMENT, AND AS
08:41AM 2 WE WOULD CONTEND, THROUGH NO FAULT OF MR. BALWANI.

08:41AM 3 THE COURT: SO HE THE WITNESS THAT WOULD LAY THAT
08:41AM 4 FOUNDATION?

08:41AM 5 MR. BRECHER: I THINK SO, YOUR HONOR.

08:41AM 6 THE COURT: HOW? HOW WOULD HE DO THAT?

08:41AM 7 MR. BRECHER: OH, WELL, SURE, YOUR HONOR.

08:41AM 8 FIRST OF ALL, AS YOU KNOW, EXPERTS ARE ALLOWED TO RELY ON
08:41AM 9 MATERIALS THAT MAY NOT THEMSELVES BE ADMISSIBLE.

08:41AM 10 THE COURT: SO HE CAN TESTIFY AS AN EXPERT ON THE
08:41AM 11 SQL -- IS THAT WHAT IT IS, SQL?

08:41AM 12 MR. BRECHER: SQL SERVERS --

08:41AM 13 THE COURT: RIGHT.

08:41AM 14 MR. BRECHER: AND DATA ENCRYPTION, YES.

08:41AM 15 THE COURT: SO HE CAN TESTIFY ABOUT THAT. HE CAN
08:41AM 16 RELY ON HEARSAY. AS WE KNOW, EXPERTS CAN RELY ON HEARSAY.

08:41AM 17 BUT IF YOU'RE GOING TO ASK HIM TO COMMENT ABOUT THE
08:41AM 18 GOVERNMENT'S INVESTIGATION, WHAT THEY HAD, WHEN THEY GOT IT,
08:41AM 19 WHAT THEY COULD HAVE DONE, THAT'S FACT TESTIMONY, IT SEEMS TO
08:41AM 20 ME, AND THAT'S WHERE THERE'S A DEPARTURE FROM HIS EXPERT
08:41AM 21 TESTIMONY.

08:41AM 22 MR. BRECHER: I THINK SO, YOUR HONOR, AT LEAST
08:41AM 23 POSSIBLY. BUT I DON'T THINK THAT THAT'S AN ISSUE HERE, AND
08:41AM 24 I'LL EXPLAIN WHY.

08:41AM 25 THE COURT: YOU KNOW, WHY I'M RAISING IT, AND JUST

08:41AM 1 BECAUSE THAT'S WHAT I'VE DISCERNED FROM YOUR PLEADINGS.

08:41AM 2 ONE OF THE PLEADINGS SEEMS TO SUGGEST THAT WE INTEND TO
08:42AM 3 ASK THE GOOD DOCTOR WHY THE GOVERNMENT DIDN'T DO WHAT THEY DID,
08:42AM 4 AND THEY COULD HAVE DONE IT IF THEY HADN'T DONE X, AND, YOU
08:42AM 5 KNOW, BE CRITICAL OF THEIR INVESTIGATION.

08:42AM 6 AND I WAS CURIOUS, ARE YOU GOING TO PUT HIM ON FOR THAT
08:42AM 7 PURPOSE?

08:42AM 8 MR. BRECHER: YES, YOUR HONOR, AT LEAST A CERTAIN
08:42AM 9 VERSION OF IT. I WANT TO BE CLEAR.

08:42AM 10 THE COURT: YES, THIS IS A GOOD TIME TO BE CLEAR.
08:42AM 11 IT'S A GOOD TIME FOR CLARITY.

08:42AM 12 MR. BRECHER: AND I HOPE THAT WE WERE IN THE COURSE
08:42AM 13 OF HIS DECLARATION AND IN OUR PLEADINGS.

08:42AM 14 BUT, FIRST OF ALL, THE FACTUAL FOUNDATION FOR THAT
08:42AM 15 EVIDENCE IS CLEARLY ADMISSIBLE. IT IS THE GOVERNMENT'S BRADY
08:42AM 16 LETTER. THIS IS AN 801(D) PARTY ADMISSION. IT'S A STATEMENT
08:42AM 17 BY THE DEPARTMENT OF JUSTICE IN THIS LITIGATION.

08:42AM 18 I BELIEVE THAT THAT DOCUMENT, YOUR HONOR, WAS SIGNED BY
08:42AM 19 MR. LEACH.

08:42AM 20 THE COURT: SO LET ME ASK -- I KEEP INTERRUPTING YOU
08:42AM 21 AND I BEG YOUR PARDON.

08:42AM 22 MR. BRECHER: NO PROBLEM.

08:42AM 23 THE COURT: BUT I THINK FOR PURPOSES OF OUR
08:42AM 24 DISCUSSION, WOULD YOU BE WILLING TO TELL US TODAY HOW YOU
08:42AM 25 INTEND TO GET THAT EVIDENCE IN?

08:42AM 1 AND IF YOU'RE NOT -- I'M NOT ASKING YOU TO REVEAL ANY
08:43AM 2 DEFENSE STRATEGY OR DEFENSE -- ANYTHING IN YOUR -- THAT YOU
08:43AM 3 DON'T WANT TO DO. I'M NOT ASKING YOU NOR ORDERING YOU TO DO
08:43AM 4 THAT AT ALL.

08:43AM 5 I WOULD JUST LIKE TO KNOW STEP BY STEP HOW YOU FORESEE
08:43AM 6 EVIDENCE COMING IN.

08:43AM 7 I SEE HIM ON THE LATTER, AS A SQL EXPERT, AND HE WILL
08:43AM 8 TESTIFY ABOUT HIS VAST KNOWLEDGE OF SQL, AND KNOWLEDGE OF
08:43AM 9 DATABASES, AND ALL OF THOSE THINGS. AND HE'LL TESTIFY THAT HE
08:43AM 10 UNDERSTANDS THE DATABASE WAS DISASSEMBLED. IT WAS GONE.

08:43AM 11 HOWEVER, BASED ON HIS VAST KNOWLEDGE, HIS OPINION IS THAT
08:43AM 12 IT COULD HAVE BEEN PUT BACK TOGETHER SUCH THAT INFORMATION
08:43AM 13 COULD HAVE BEEN RETRIEVABLE.

08:43AM 14 HE'S GOING TO SAY THAT I TAKE IT?

08:43AM 15 MR. BRECHER: YES.

08:43AM 16 THE COURT: OKAY. SO WE PUT HIM THERE.

08:43AM 17 AND THEN WHAT ABOUT THE TOP AND BOTTOM OF THAT? HOW DO WE
08:43AM 18 GET TO THE FOUNDATION OF ANYTHING ELSE THAT YOU WOULD LIKE HIM
08:43AM 19 TO TESTIFY ABOUT?

08:43AM 20 MR. BRECHER: SURE. WELL, TWO POINTS ON THAT,
08:44AM 21 YOUR HONOR.

08:44AM 22 THE COURT: AGAIN, DON'T REVEAL ANYTHING YOU DON'T
08:44AM 23 WANT TO. AND IF YOU WANT TO CONSULT WITH YOUR PARTIES, PLEASE
08:44AM 24 DO SO, BUT I'M NOT ASKING YOU TO REVEAL ANY DEFENSE STRATEGIES
08:44AM 25 AT ALL.

08:44AM 1 MR. BRECHER: I APPRECIATE THAT, YOUR HONOR.

08:44AM 2 I THINK WE FEEL COMFORTABLE SHARING IN SOME DETAIL HOW AND
08:44AM 3 WHY WE WOULD GO ABOUT ESTABLISHING IT BECAUSE IT'S IMPORTANT TO
08:44AM 4 UNDERSTANDING THE VIABILITY OF THIS DEFENSE.

08:44AM 5 AND THERE ARE TWO ISSUES TO BEAR IN MIND, YOUR HONOR.

08:44AM 6 FIRST, OUT OF FAIRNESS TO THE GOVERNMENT, WE FEEL THAT WE
08:44AM 7 MUST LAY THE APPROPRIATE FOUNDATION TO SHOW THAT THERE WAS THIS
08:44AM 8 ENCRYPTED COPY THAT WAS GIVEN THAT NO ONE COULD OPEN BECAUSE
08:44AM 9 WE'RE NOT GOING TO BLAME THE GOVERNMENT FOR THAT.

08:44AM 10 THE COURT: SURE.

08:44AM 11 MR. BRECHER: THAT WOULD BE INAPPROPRIATE.

08:44AM 12 THE COURT: SURE. AND HOW DO YOU DO THAT?

08:44AM 13 MR. BRECHER: WELL, THROUGH THE BRADY LETTER,
08:44AM 14 YOUR HONOR, WHICH ESTABLISHES ALL OF THESE PIECES.

08:44AM 15 THE COURT: AND HOW DO YOU DO THAT?

08:44AM 16 MR. BRECHER: I'M SORRY, YOUR HONOR?

08:44AM 17 THE COURT: YOU WANT TO INTRODUCE THE BRADY LETTER?

08:44AM 18 MR. BRECHER: NOT NECESSARILY ALL OF THE LETTER,
08:44AM 19 YOUR HONOR. I THINK THAT THE --

08:44AM 20 THE COURT: YOU WANT TO INTRODUCE PARTS OF A BRADY
08:44AM 21 LETTER AND LAY A FOUNDATION AND TALK TO THE JURY ABOUT BRADY V.
08:44AM 22 MARYLAND, AND WE WANT TO INTRODUCE THE LETTER?

08:44AM 23 MR. BRECHER: NOT THE DETAILS THAT YOUR HONOR JUST
08:44AM 24 SUGGESTED.

08:44AM 25 I THINK THE BEST ANALOGY, YOUR HONOR, IS WHAT ACTUALLY

08:45AM 1 HAPPENED IN COURT JUST THIS PAST WEEK. AND YOU'LL REMEMBER
08:45AM 2 THAT THROUGH MR. GROSSMAN, THERE WAS A DISPUTE BETWEEN
08:45AM 3 MS. WALSH AND MR. LEACH ABOUT THE AVAILABILITY OF -- EXCUSE ME,
08:45AM 4 THE ADMISSIBILITY OF CERTAIN INTERROGATORY RESPONSES THAT HAVE
08:45AM 5 BEEN FILED IN THE PFM CIVIL LITIGATION BY MR. BALWANI.

08:45AM 6 AND THE COURT HAD SOME OF THOSE SAME CONCERNS, AS DID WE.
08:45AM 7 DO WE NEED TO EXPLAIN TO THE JURY WHAT AN INTERROGATORY
08:45AM 8 RESPONSE IS? WHAT THIS SEPARATE LITIGATION IS? ARE THERE 403
08:45AM 9 CONCERNS?

08:45AM 10 AND WHERE YOUR HONOR CAME DOWN, BECAUSE THIS JUST HAPPENED
08:45AM 11 LAST WEEK AND PORTIONS OF THOSE RESPONSES CAME INTO EVIDENCE,
08:45AM 12 IS THAT WE COULD PRESENT OR THE GOVERNMENT COULD INTRODUCE
08:45AM 13 REDACTED TEXTS FROM THOSE RESPONSES.

08:45AM 14 AND THE FOUNDATION THAT WAS LAID THROUGH THE WITNESS WAS
08:45AM 15 SIMPLY THAT HE UNDERSTOOD THAT THESE WERE MR. BALWANI'S ANSWERS
08:45AM 16 TO QUESTIONS, WITHOUT GETTING INTO THE CONTEXT OF WHY THIS WAS
08:45AM 17 HAPPENING OR THE FACT THERE WAS CIVIL LITIGATION.

08:46AM 18 THE COURT: SURE.

08:46AM 19 MR. BRECHER: THIS, YOUR HONOR, I THINK IS A MUCH
08:46AM 20 EASIER QUESTION BECAUSE THIS DOESN'T RELATE TO SEPARATE
08:46AM 21 LITIGATION, IT RELATES TO THIS LITIGATION.

08:46AM 22 THE COURT: SO HOW WOULD YOU DO IT? HOW WOULD YOU
08:46AM 23 DO IT?

08:46AM 24 MR. BRECHER: SURE. WELL, YOUR HONOR, WE HAVE THE
08:46AM 25 BRADY LETTER, AND I THINK WE FILED IT TWO OR THREE TIMES IN

08:46AM 1 VARIOUS REDACTED FORMS. I THINK WHAT WE WOULD DO IS REDACT THE
08:46AM 2 TOP OF THE LETTER AND THE BULK OF THE TEXT.

08:46AM 3 WE WOULD ONLY MAKE CLEAR THAT THERE'S A SIGNATURE FROM THE
08:46AM 4 PROSECUTION TEAM TO SHOW THAT THIS IS A REPRESENTATION FROM THE
08:46AM 5 GOVERNMENT, AND WE WOULD DISPLAY CERTAIN PARAGRAPHS.

08:46AM 6 AND ALL WE WOULD DO IS EXACTLY WHAT WAS DONE WITH
08:46AM 7 MR. GROSSMAN AND THE PFM INTERROGATORIES, WHICH IS, DO YOU
08:46AM 8 UNDERSTAND THAT THESE ARE STATEMENTS MADE BY THE GOVERNMENT IN
08:46AM 9 THIS CASE?

08:46AM 10 THE COURT: AND THE STATEMENTS WOULD BE THE -- IT
08:46AM 11 SEEMS LIKE WHAT YOU'RE EAGER TO GET IN, IS THE STATEMENT BY AN
08:46AM 12 I.T. EMPLOYEE, PARALEGAL OR SOME SORT, WHO OPINED WHY DON'T YOU
08:46AM 13 DO THIS?

08:46AM 14 IS THAT IT? IS THAT IT?

08:46AM 15 MR. BRECHER: THAT IS ONE OF THE STATEMENTS,
08:47AM 16 YOUR HONOR.

08:47AM 17 I THINK MOST OF THE OTHERS WOULD RELATE TO PROVIDING THAT
08:47AM 18 CONTEXT, THAT, AGAIN, I THINK WE HAVE TO PROVIDE IN ORDER FOR
08:47AM 19 MR. SONNIER'S TESTIMONY TO MAKE SENSE, AND, FRANKLY, IN ORDER
08:47AM 20 TO BE FAIR TO THE GOVERNMENT, TO MAKE SURE THE JURY DOES KNOW
08:47AM 21 THERE WAS THIS COPY THAT NOBODY COULD ACCESS, AND THERE WAS
08:47AM 22 CONCERN ABOUT HOW DO WE GO ABOUT THAT.

08:47AM 23 THE COURT: SURE.

08:47AM 24 I'M SURE WE ALL WRESTLED WITH THIS, THIS WEEKEND, HOW DOES
08:47AM 25 THIS COME IN, IF IT COMES IN AT ALL? AND IN WHAT SCENARIO

08:47AM 1 WOULD IT COME IN?

08:47AM 2 AND HAVE YOU PUT TOGETHER SOMETHING THAT YOU COULD SHARE
08:47AM 3 WITH ME OTHER THAN OUR QUESTION BY QUESTION?

08:47AM 4 MR. BRECHER: WE HAVE NOT, YOUR HONOR. WE WOULD BE
08:47AM 5 MORE THAN HAPPY TO DO SO, AND I'M SURE WE COULD DO SO LATER
08:47AM 6 THIS AFTERNOON IF THE COURT WOULD LIKE.

08:47AM 7 THE COURT: BECAUSE WHEN I LOOK AT WHAT YOU WANT TO
08:47AM 8 DO, AND, YOU KNOW, WE READ THE CASES, AND I UNDERSTAND, YOU
08:47AM 9 KNOW, YOU DO NOT WANT THE COURT TO IN ANY WAY DISABUSE YOUR
08:47AM 10 ABILITY TO PUT ON A DEFENSE OR TO CRITICIZE THE GOVERNMENT'S
08:48AM 11 INVESTIGATION.

08:48AM 12 UNDERSTOOD. THAT'S CRIMINAL LAW 101, ISN'T IT?

08:48AM 13 MR. BRECHER: I'D LIKE TO THINK SO, YOUR HONOR.

08:48AM 14 THE COURT: RIGHT. THAT'S WHAT HAPPENS.

08:48AM 15 MR. BRECHER: BUT THERE ARE SOME PLEADINGS THAT HAVE
08:48AM 16 SUGGESTED OTHERWISE.

08:48AM 17 THE COURT: WELL, I WON'T ASK YOU WHICH SIDE.

08:48AM 18 SO IF HE TESTIFIES -- MY CONCERN WAS, HE CANNOT TESTIFY
08:48AM 19 ABOUT THE BRADY CONDUCT OR WHAT THE GOVERNMENT DID. HE CAN'T
08:48AM 20 TESTIFY, OH, THE GOVERNMENT SHOULD HAVE, WOULD HAVE, COULD
08:48AM 21 HAVE, AND BECAUSE THEY DIDN'T.

08:48AM 22 IT SEEMS LIKE HE IS THE EXPERT TO SAY, YOU CAN DO THIS, IF
08:48AM 23 YOU GET IT, YOU CAN ACTUALLY REBUILD IT, AND THAT'S HOW IT CAN
08:48AM 24 BE DONE.

08:48AM 25 AND THEN THE OTHER GAPS, I THINK, THE CONTEXT AS WELL, I'M

08:48AM 1 WONDERING ABOUT, HOW DOES THAT COME IN?

08:48AM 2 YOU KNOW, OVER THE WEEKEND, I THOUGHT, WELL, MAYBE THESE
08:48AM 3 PARTIES, BECAUSE THEY'VE BEEN GETTING ALONG SO WELL, THEY'LL
08:48AM 4 PROBABLY STIPULATE TO A CERTAIN FACT PATTERN THAT COMES IN,
08:48AM 5 MAYBE NOT.

08:48AM 6 BUT WHO WOULD YOU CALL? WOULD YOU INTEND TO CALL -- I
08:49AM 7 KNOW THERE WAS SOME LANGUAGE ABOUT WE'LL CALL MR. LEACH,
08:49AM 8 MR. BOSTIC, WE'LL CALL THE PARALEGAL, WE'LL CALL THE
08:49AM 9 UNITED STATES ATTORNEY IN.

08:49AM 10 MR. BRECHER: WELL, YOUR HONOR, I DON'T THINK THAT
08:49AM 11 ANY OF THAT IS NECESSARY.

08:49AM 12 FIRST, YOUR HONOR, IN ADDITION TO THE --

08:49AM 13 THE COURT: WELL, THAT'S A RELIEF.

08:49AM 14 MR. BRECHER: IN ADDITION TO THE BRADY LETTER,
08:49AM 15 YOUR HONOR, THERE MAY ALSO BE -- WE HAVE A PENDING DISCOVERY
08:49AM 16 MOTION, SO THERE MAY BE EMAILS THAT DISCUSS THESE VERY
08:49AM 17 RECOMMENDATIONS TO THE GOVERNMENT THAT WE HOPE YOUR HONOR WILL
08:49AM 18 ORDER THE GOVERNMENT TO PRODUCE TO US.

08:49AM 19 BUT I THINK THE ISSUE IS, THOSE EMAILS AND THAT BRADY
08:49AM 20 LETTER, THOSE ARE STATEMENTS AND CONDUCT BY DOJ EMPLOYEES
08:49AM 21 ACTING WITHIN THE SCOPE OF THEIR RESPONSIBILITY.

08:49AM 22 THE COURT: SO LET'S NOT TALK ABOUT ADMISSIBILITY.

08:49AM 23 I'M JUST CURIOUS HOW AND WHAT WOULD YOU DO? HOW DOES
08:49AM 24 THAT COME IN?

08:49AM 25 MR. BRECHER: WELL, YOUR HONOR, AS THE COURT KNOWS

08:49AM 1 FROM AN ARGUMENT THAT MY COLLEAGUE, MS. ESTRADA, HAD WITH
08:49AM 2 MR. SCHENK ABOUT TWO WEEKS AGO, AS LONG AS THE EVIDENCE ITSELF
08:49AM 3 IS ADMISSIBLE, YOU DON'T NEED A WITNESS WITH PERSONAL KNOWLEDGE
08:49AM 4 OF THE MATERIAL IN ORDER TO INTRODUCE IT.

08:49AM 5 WE SAW THAT WITH THE CHRISTIAN HOLMES EMAIL.

08:50AM 6 THE COURT: I'M SORRY. I'M NOT BEING CLEAR.

08:50AM 7 I'M ASKING YOU, HOW DOES IT COME IN? WHO IS IT? JUST,
08:50AM 8 HOW DOES THAT COME IN? DOES IT COME IN THROUGH SONNIER OR DO
08:50AM 9 YOU DO SOMETHING ELSE TO GET THIS IN?

08:50AM 10 MR. BRECHER: OH. I THINK, YOUR HONOR, WE WOULD
08:50AM 11 WANT TO KEEP THIS AS CLEAN AND AS SIMPLE AS POSSIBLE.

08:50AM 12 WE WOULD USE MR. SONNIER AND INTRODUCE THROUGH HIM
08:50AM 13 WHATEVER ADMISSIBLE MATERIALS YOUR HONOR ALLOWS US TO USE FROM
08:50AM 14 THE BRADY LETTER.

08:50AM 15 THE COURT: AND THAT QUESTION WOULD BE -- WHAT WOULD
08:50AM 16 THAT QUESTION BE TO HIM?

08:50AM 17 MR. BRECHER: I THINK IT WOULD BE EXACTLY THE SAME
08:50AM 18 QUESTION THAT THE GOVERNMENT WAS ALLOWED TO ASK OF MR. GROSSMAN
08:50AM 19 WITH RESPECT TO THE PFM INTERROGATORY RESPONSES.

08:50AM 20 THE COURT: SO HERE'S A STATEMENT FROM THE PARALEGAL
08:50AM 21 WHO SAID "WHY DON'T YOU TRY DOING THIS, WHY DON'T YOU TRY
08:50AM 22 PUTTING IT BACK TOGETHER?" AND YOU WOULD SHOW HIM THAT AND
08:50AM 23 SAY, "DO YOU AGREE WITH THAT?" AND HE'LL SAY, "YES, YES."

08:50AM 24 MR. BRECHER: THAT'S ESSENTIALLY IT, YOUR HONOR.

08:50AM 25 THE COURT: RIGHT.

08:50AM 1 AND THEN WILL HE SAY, "BUT THEY DIDN'T DO IT SO SHAME ON
08:50AM 2 THEM?" HE CAN'T SAY THAT.

08:50AM 3 MR. BRECHER: I DON'T THINK HE'S GOING TO SAY,
08:51AM 4 "SHAME ON THEM," YOUR HONOR.

08:51AM 5 I THINK IT'S ENOUGH FOR US TO SAY WE DON'T HAVE THIS
08:51AM 6 EVIDENCE, SO THEY CLEARLY DIDN'T DO IT.

08:51AM 7 THE COURT: YOU CAN SAY THAT NOW. DON'T YOU? YOU
08:51AM 8 HAVE SUFFICIENT EVIDENCE TO SAY THAT NOW.

08:51AM 9 MR. BRECHER: YES.

08:51AM 10 THE COURT: WHY DO YOU NEED THIS?

08:51AM 11 MR. BRECHER: WELL, YOUR HONOR, WE NEED IT FOR A
08:51AM 12 COUPLE OF REASONS.

08:51AM 13 FIRST -- AND WE SHOULD REMEMBER THE PROCEDURAL CONTEXT
08:51AM 14 HERE. IN THE LEAD UP TO THE HOLMES TRIAL, THERE WAS A SERIES
08:51AM 15 OF DEBATES ABOUT WHAT EVIDENCE ABOUT THE LIS COULD COME IN AND
08:51AM 16 LIS FAULT.

08:51AM 17 AND THE COURT ISSUED THREE RULINGS. THIS WAS DOCKET 798.

08:51AM 18 AND RULING NUMBER ONE WAS THAT UNLESS THE DEFENSE OPENED
08:51AM 19 THE DOOR, THE GOVERNMENT COULD NOT RAISE THE ISSUE OF
08:51AM 20 THERANOS'S FAULT IN THE LOSS OF THE LIS.

08:51AM 21 RULING NUMBER TWO WAS THAT MERELY MENTIONING THE ABSENCE
08:51AM 22 OF THE LIS DATA WOULD NOT OPEN THAT DOOR.

08:51AM 23 AND THEN RULING NUMBER THREE WAS IF THE DEFENSE, IN THIS
08:51AM 24 CASE THE HOLMES DEFENSE, WOULD HAVE BLAMED THE GOVERNMENT FOR
08:51AM 25 THE LOSS OF THE LIS, THEN IT WOULD OPEN THE DOOR TO SOMETHING,

08:51AM 1 AND THERE WOULD HAVE TO BE FURTHER LITIGATION TO FIGURE OUT
08:52AM 2 EXACTLY WHAT.

08:52AM 3 AS YOU'LL RECALL, YOUR HONOR, IN OUR OWN MIL'S, WE
08:52AM 4 REQUESTED THE COURT ADOPT THAT PRECISE RULING.

08:52AM 5 BUT THE GOVERNMENT SAID SOMETHING DIFFERENT. THE
08:52AM 6 GOVERNMENT SAID HOLD ON, STOP RIGHT THERE. WE'VE THOUGHT ABOUT
08:52AM 7 THINGS IN A DIFFERENT WAY.

08:52AM 8 AND, IN FACT, IF YOU TALK ABOUT THE ABSENCE OF THE LIS,
08:52AM 9 THAT IS IMPLIEDLY BLAMING THE GOVERNMENT FOR ITS LOSS BECAUSE
08:52AM 10 THE GOVERNMENT BEARS THE BURDEN OF PROOF.

08:52AM 11 WE OPPOSED THAT. AND YOUR HONOR SIDED WITH THE GOVERNMENT
08:52AM 12 ON THAT ISSUE.

08:52AM 13 THE COURT: I'M NOT SURE. I THINK THAT'S A BROAD
08:52AM 14 READING.

08:52AM 15 I NEVER, NEVER SAID THAT YOU WOULD BE PERMITTED TO
08:52AM 16 CRITICIZE THE ABSENCE OF THAT MATERIAL.

08:52AM 17 MR. BRECHER: OH, NO, YOUR HONOR, YOU DID NOT. AND
08:52AM 18 THAT'S ACTUALLY ONE OF THE THINGS WE'RE RELYING ON IN
08:52AM 19 PRESENTING THIS DEFENSE.

08:52AM 20 THE COURT: RIGHT.

08:52AM 21 MR. BRECHER: BUT I SHOULD HAVE BEEN CLEAR, WHAT THE
08:52AM 22 COURT CITED WITH THE GOVERNMENT ON IS IF THE DEFENSE TALKS
08:52AM 23 ABOUT THE ABSENCE OF THE LIS IN PARTICULAR, THAT IS IMPLIEDLY
08:52AM 24 FAULTING THE GOVERNMENT FOR ITS LOSS, AND IT ALLOWS -- IT OPENS
08:53AM 25 THE DOOR TO SOMETHING. WE STILL DON'T KNOW WHAT.

08:53AM 1 THE COURT: WELL, I THINK THAT'S A LITTLE BROAD.

08:53AM 2 IF -- I THINK THERE HAS TO BE MORE.

08:53AM 3 YOU'RE ABLE -- THE DEFENSE IS ALWAYS GOING TO BE ABLE TO
08:53AM 4 SAY, "THEY HAVEN'T PROVED THEIR CASE. AND HERE'S WHAT THEY
08:53AM 5 HAVE, THEY HAVE THREE PATIENTS. AND YOU HEARD THEM. THREE
08:53AM 6 PATIENTS. YOU HEARD EVIDENCE, LADIES AND GENTLEMEN, THAT THERE
08:53AM 7 WERE HOWEVER MANY TESTS."

08:53AM 8 ACTUALLY, I'M NOT SURE ANYBODY HAS TESTIFIED YET AS TO
08:53AM 9 WHETHER THERE WERE HUNDREDS AND THOUSANDS OR MILLIONS OF TESTS
08:53AM 10 THAT WOULD LIE ON THE LIS. MAYBE YOU HAVE RECOLLECTION OF
08:53AM 11 THAT. I KNOW THERE WAS SOME TESTIMONY ABOUT THAT IN THE HOLMES
08:53AM 12 CASE. THERE MAY BE SOME HERE, I JUST DON'T RECALL.

08:53AM 13 BUT TO THIS POINT, THE COURT HAD SAID IN ITS ORDER IN THIS
08:53AM 14 CASE -- AND I WAS NOT TRYING TO DISABUSE ANYONE OF PUTTING A
08:53AM 15 DEFENSE ON AT ALL. I WANT TO BE CLEAR ABOUT THAT.

08:53AM 16 MR. BRECHER: WE DIDN'T TAKE IT THAT WAY,
08:54AM 17 YOUR HONOR.

08:54AM 18 THE COURT: WHAT I WAS TRYING TO LET THE PARTIES
08:54AM 19 KNOW IS THAT IF EITHER PARTY, EITHER PARTY TRIES TO DO
08:54AM 20 SOMETHING WITH THE LIS, IT MAY VERY WELL OPEN THE DOOR BECAUSE
08:54AM 21 WE ALL KNOW THERE ARE SEVERAL DOORS AVAILABLE REGARDING THIS
08:54AM 22 LIS. THERE'S A LOT OF BACKGROUND INFORMATION THAT THE JURY
08:54AM 23 DOES NOT KNOW AT THIS POINT.

08:54AM 24 AND DEPENDING ON HOW THE ARGUMENTS GO AND WHAT THE
08:54AM 25 TESTIMONY IS, DOORS COULD BE OPENED.

08:54AM 1 NOT TO GET AHEAD OF MYSELF, BUT IF THE DEFENSE DECIDES TO
08:54AM 2 PUT THIS ON, THE GOVERNMENT MAY WANT TO -- WELL, MS. VOLKAR
08:54AM 3 SAID THAT IN HER PLEADINGS, DIDN'T SHE?

08:54AM 4 MR. BRECHER: YES, YOUR HONOR.

08:54AM 5 THE COURT: WE'LL PUT ALL OF THE OTHER EVIDENCE IN,
08:54AM 6 AND THE COURT MIGHT SAY, AS YOU RECOGNIZE, FAIRNESS TO THE
08:54AM 7 GOVERNMENT, THERE MIGHT BE SOME OR ALL OF THAT, THAT WOULD AT
08:54AM 8 LEAST BE CONSIDERED FOR ADMISSIBILITY, TO GIVE THE JURY THE
08:54AM 9 ENTIRE STORY, AS YOU SAID.

08:54AM 10 MR. BRECHER: YES, YOUR HONOR. I'M HAPPY TO ADDRESS
08:54AM 11 AND PLAN TO ADDRESS TODAY PRECISELY WHERE WE THINK THAT THOSE
08:54AM 12 LINES SHOULD BE DRAWN.

08:54AM 13 BUT I WANT TO MAKE SURE THAT I STICK WITH ANSWERING THE
08:55AM 14 COURT'S QUESTIONS FOR NOW JUST TO MAKE IT CLEAR HOW WE INTEND
08:55AM 15 TO DO THIS.

08:55AM 16 I THINK IT'S NOT A PARTICULARLY COMPLICATED EXERCISE.
08:55AM 17 IT'S ONE THAT REALLY TRACKS WELL, WHAT THE COURT ALLOWED
08:55AM 18 MR. LEACH TO DO WITH MR. GROSSMAN THE OTHER DAY.

08:55AM 19 "MR. SONNIER, DO YOU UNDERSTAND THAT THESE ARE
08:55AM 20 REPRESENTATIONS BY THE GOVERNMENT?" FULL STOP. THAT'S IT.

08:55AM 21 HERE'S A PIECE TALKING ABOUT THIS ENCRYPTED COPYING OF A
08:55AM 22 DATABASE. HERE'S A PARAGRAPH SAYING IT COULDN'T BE OPENED.
08:55AM 23 HERE'S A RECOMMENDATION FROM THE GOVERNMENT'S TECHNICAL
08:55AM 24 SUPERVISOR SAYING WHY DON'T YOU TRY THIS. AND THEN THE
08:55AM 25 FOLLOWUP.

08:55AM 1 MR. SONNIER, DO YOU AGREE WITH THAT? WOULD THAT HAVE
08:55AM 2 WORKED?

08:55AM 3 YES.

08:55AM 4 I DON'T THINK IT GETS SIGNIFICANTLY MORE COMPLICATED THAN
08:55AM 5 THAT.

08:55AM 6 THE COURT: THAT'S ABOUT A TEN MINUTE TESTIMONY
08:55AM 7 THEN.

08:55AM 8 MR. BRECHER: WELL, YOUR HONOR, I THINK IT MAY BE A
08:55AM 9 LITTLE LONGER IF ONLY TO ESTABLISH HIS BONE FIDES AS AN EXPERT.
08:55AM 10 AND I IMAGINE THAT THAT FOUNDATION WOULD TAKE SLIGHTLY LONGER
08:55AM 11 THAN I'VE JUST ARTICULATED IT. BUT THE ESSENCE OF IT IS JUST
08:55AM 12 THAT.

08:55AM 13 THE COURT: SO HE WOULD NOT SAY, WELL, BECAUSE THEY
08:56AM 14 DID X, THEY SAT ON IT, THEY DIDN'T DO THAT, THAT WAS
08:56AM 15 MALFEASANCE, AND THEY SHOULD HAVE KNOWN BETTER OR THEY SHOULD
08:56AM 16 HAVE GOT ON IT SOONER, OR THEY SHOULD HAVE REALIZED THIS, HE'S
08:56AM 17 NOT GOING TO TESTIFY ABOUT THAT, CRITICIZING THE GOVERNMENT IN
08:56AM 18 THEIR ACTIONS?

08:56AM 19 MR. BRECHER: WELL, NO AND POSSIBLY YES.

08:56AM 20 AGAIN, I WANT TO BE CLEAR AT EVERY STAGE WHAT WE'RE
08:56AM 21 TALKING ABOUT.

08:56AM 22 THE COURT: SURE.

08:56AM 23 MR. BRECHER: SO THE POINT RAISED BY MS. VOLKAR IN
08:56AM 24 THE GOVERNMENT'S REPLY BRIEF, RIGHT, THAT MR. SONNIER MAY
08:56AM 25 OFFER, A FEAR THAT MR. SONNIER WOULD OFFER LEGAL CONCLUSIONS

08:56AM 1 ABOUT NEGLIGENCE OR RECKLESSNESS, WE'RE NOT GOING TO ASK HIM
08:56AM 2 THAT. THAT'S AN ISSUE FOR THE JURY.

08:56AM 3 AND IF WE'RE ALLOWED TO RAISE THIS SORT OF ADVERSE
08:56AM 4 INFERENCE INSTRUCTION, WHICH WE PLAN TO PRESS AT THE CHARGING
08:56AM 5 CONFERENCE, AND YOUR HONOR HAS DEFERRED RULING ON THAT ISSUE,
08:56AM 6 THEN WE WOULD ARGUE FROM THE INFERENCES.

08:56AM 7 THAT'S NOT SOMETHING FOR MR. SONNIER TO TESTIFY ABOUT.

08:56AM 8 WHAT HE MIGHT SAY THAT COMES CLOSE TO CRITICISM, I GUESS,
08:56AM 9 IS, YES, I AGREE, AND THE GOVERNMENT COULD HAVE DONE THAT. AND
08:57AM 10 STOP THERE.

08:57AM 11 THE COURT: HOW DOES HE KNOW THAT?

08:57AM 12 MR. BRECHER: YOUR HONOR, FIRST OF ALL, THIS IS A
08:57AM 13 FOUNDATIONAL ISSUE FOR MR. SONNIER'S BACKGROUND. BUT AS WE
08:57AM 14 WILL ESTABLISH -- AND HIS CV IS ALREADY ATTACHED AS EXHIBIT A
08:57AM 15 TO DOCKET 1158 REFLECTS -- I'M SORRY, MS. RODRIGUEZ.

08:57AM 16 MR. SONNIER IS A VETERAN OF COUNTLESS FORENSIC
08:57AM 17 INVESTIGATIONS. THIS IS WHAT HE DOES FOR A LIVING. HE'S GOING
08:57AM 18 TO SAY, "I'M FAMILIAR WITH HOW WE SEIZE EVIDENCE, AND I HAVE
08:57AM 19 ALSO REVIEWED MATERIAL."

08:57AM 20 AND YOUR HONOR WILL RECALL, EXPERTS CAN FORM OPINIONS
08:57AM 21 BASED ON EVEN INADMISSIBLE MATERIALS THEY REVIEW IF IT'S
08:57AM 22 RELIABLE WITHIN THEIR FIELD.

08:57AM 23 AND HE'S GOING TO SAY, I'VE LOOKED AT LITERATURE THAT I
08:57AM 24 CONSIDER RELIABLE IN MY FIELD AND THAT OTHER EXPERTS RELY ON
08:57AM 25 ABOUT BEST PRACTICES AND WHAT SHOULD BE DONE IN SEIZING

08:57AM 1 ELECTRONIC DATA, AND I THINK THE GOVERNMENT COULD HAVE DONE
08:57AM 2 THIS. AND I DON'T SEE HOW THAT'S CONTROVERSIAL, YOUR HONOR.

08:57AM 3 THE COURT: I THINK IT MIGHT BE. I THINK IT MIGHT
08:57AM 4 BE.

08:57AM 5 IF HE STARTS TO TESTIFY ABOUT -- I THINK YOU WANT TO
08:58AM 6 INTRODUCE SOMETHING, AND WE'LL TALK ABOUT YOUR EXHIBITS,
08:58AM 7 THERE'S A LIST OF EXHIBITS AND ONE OF THEM IS A SECRET
08:58AM 8 SERVICE MANUAL.

08:58AM 9 MR. BRECHER: WE DON'T INTEND TO INTRODUCE THAT,
08:58AM 10 YOUR HONOR.

08:58AM 11 THE COURT: RIGHT.

08:58AM 12 MR. BRECHER: I'M HAPPY TO ADDRESS THOSE NOW SINCE
08:58AM 13 THE COURT RAISED THEM.

08:58AM 14 THE COURT: WELL, I RAISED THEM BECAUSE I LOOKED AT
08:58AM 15 THEM AND I THOUGHT, OH, DEAR, WHERE ARE WE GOING?

08:58AM 16 MR. BRECHER: YOUR HONOR, WHERE WE'RE GOING IS VERY
08:58AM 17 SIMPLE. IT'S A MATTER OF COURTESY TO THE GOVERNMENT AND TO ALL
08:58AM 18 PARTIES TO MARK EVERYTHING THAT AN EXPERT RELIED ON AS AN
08:58AM 19 EXHIBIT.

08:58AM 20 AND AS YOU KNOW, WE CAN REFRESH ANY WITNESS'S
08:58AM 21 RECOLLECTION, BUT CERTAINLY AN EXPERT'S RECOLLECTION WITH
08:58AM 22 VIRTUALLY ANYTHING.

08:58AM 23 THE PURPOSE OF DOCUMENTS LIKE THOSE, ARE NOT TO INTRODUCE
08:58AM 24 THEM INTO EVIDENCE. IT'S SO IF WE ASK MR. SONNIER A QUESTION,
08:58AM 25 AND HE STUMBLES A BIT, WHOEVER IS CONDUCTING THAT EXAMINATION

08:58AM 1 COULD SAY SOMETHING LIKE, MR. SONNIER, COULD YOU FLIP TO
08:58AM 2 EXHIBIT 20560 IN YOUR BINDER, TAKE A LOOK AT IT. DOES THAT
08:58AM 3 REFRESH YOUR RECOLLECTION? DOES THAT HELP YOU ARTICULATE THE
08:58AM 4 OPINIONS THAT YOU'VE FORMED?

08:58AM 5 THAT'S ALWAYS PERMISSIBLE UNDER THE RULES OF EVIDENCE.

08:59AM 6 SO, NO, THAT'S NOT WHAT OUR EXHIBIT LIST REFLECTS AND
08:59AM 7 NOTHING THAT WE HAVE SAID IN OUR PLEADINGS SUGGEST OTHERWISE.

08:59AM 8 THE COURT: SO I WONDER IF, I WONDER IF IT WOULD BE
08:59AM 9 HELPFUL, AND IF YOU'RE WILLING TO OR WANT TO -- AND AGAIN, I'M
08:59AM 10 NOT GOING TO ORDER YOU TO DO THIS, BUT IT MIGHT BE HELPFUL TO
08:59AM 11 THE PARTIES IF YOU WERE TO PUT TOGETHER A -- I'M NOT ASKING YOU
08:59AM 12 TO GIVE US WHAT YOUR TESTIMONY OR QUESTIONS ARE GOING TO BE,
08:59AM 13 BUT IT MIGHT BE HELPFUL TO SEE AN OUTLINE OF WHAT WE'RE TALKING
08:59AM 14 ABOUT HERE, HOW THAT'S GOING TO WORK CONTEXTUALLY?

08:59AM 15 AND IF YOU PREFER NOT TO DO THAT, THAT'S FINE, WE'LL
08:59AM 16 CONTINUE TO TALKING ABOUT THIS. BUT THAT MIGHT BE HELPFUL.

08:59AM 17 MR. BRECHER: I APPRECIATE IT, YOUR HONOR.

08:59AM 18 I THINK ON THAT, BECAUSE OF THE VERY I THINK SOMEWHAT
08:59AM 19 SERIOUS WORK PRODUCT CONCERNS, I WOULD LIKE TO AT LEAST CONSULT
08:59AM 20 WITH MY TEAM AND MY CLIENT BEFORE I MAKE THAT SORT OF
08:59AM 21 COMMITMENT.

08:59AM 22 BUT WE CAN TALK ABOUT THAT AT THE BREAK. AND I AM HAPPY
08:59AM 23 TO ANSWER ANY OF THE COURT'S QUESTIONS.

08:59AM 24 (DISCUSSION AMONGST DEFENSE COUNSEL OFF THE RECORD.)

09:00AM 25 MR. BRECHER: I'M TOLD THAT'S IT'S FINE. WE WOULD

09:00AM 1 BE HAPPY TO DO THAT, YOUR HONOR.

09:00AM 2 THE COURT: OKAY. WELL, THAT WOULD BE HELPFUL, I
09:00AM 3 THINK, TO THE DISCUSSION. I'VE LOOKED AT THIS, AND I'M TRYING
09:00AM 4 TO FATHOM, BEFORE I MAKE A DECISION, I SHOULD PROBABLY KNOW
09:00AM 5 WHERE IS THIS GOING TO GO AND HOW IS IT GOING TO COME IN?

09:00AM 6 I WOULD RATHER DO THAT, IF WE CAN, OUTSIDE OF THE PRESENCE
09:00AM 7 OF THE JURY, IN ADVANCE. AND AGAIN, I'M NOT ASKING YOU TO GIVE
09:00AM 8 ME YOUR SCRIPT OF QUESTIONS, BUT JUST AN IDEA OF WHAT IS THE
09:00AM 9 FOUNDATION, HOW IS THIS GOING TO BE, SO WE CAN LOOK AT IT AND
09:00AM 10 MAYBE HAVE SOME CONVERSATION TO HELP BOTH SIDES ON THAT.

09:00AM 11 MR. BRECHER: I UNDERSTAND, YOUR HONOR.

09:00AM 12 WELL, MR. COOPERSMITH TOLD ME IT'S FINE, SO I'M GOING TO
09:00AM 13 TAKE HIM AT HIS WORD ON THAT.

09:00AM 14 THE COURT: OKAY.

09:00AM 15 MR. BRECHER: BUT WE APPRECIATE THAT, YOUR HONOR.

09:00AM 16 ACTUALLY, YOUR HONOR, I WAS GOING TO SPEAK TO THE ISSUES
09:00AM 17 THAT THE GOVERNMENT RAISED, BUT IT'S THEIR MOTION.

09:00AM 18 THE COURT: RIGHT. AND I STARTED WITH YOU BECAUSE I
09:00AM 19 WANTED TO KNOW WHAT IS IT YOU WANT FROM MR. SONNIER? HOW DO
09:00AM 20 YOU INTEND TO GET IT IN?

09:01AM 21 I'M RELIEVED TO HEAR THAT YOU'RE NOT GOING TO CALL AND YOU
09:01AM 22 DON'T INTEND TO CALL ANY OF THE PROSECUTING ATTORNEYS HERE TO
09:01AM 23 TESTIFY ABOUT THEIR CONDUCT OR ANYTHING THEY DID IN RELATION TO
09:01AM 24 THIS ISSUE.

09:01AM 25 MR. BRECHER: NO, YOUR HONOR. I THINK EVERYTHING

09:01AM 1 THAT WE NEED WOULD BE REFLECTED EITHER IN THE EMAILS THAT WE'VE
09:01AM 2 REQUESTED, WHICH WOULD BE AUTHENTIC. AND THERE IS CASE LAWSUIT
09:01AM 3 THAT WE HAVE ALREADY CITED THAT AUTHENTICITY IS USUALLY
09:01AM 4 ESTABLISHED SIMPLY BY BEING INTRODUCED BY THE OTHER PARTY, AND
09:01AM 5 THEY WOULD REFLECT CONDUCT TAKEN BY DOJ EMPLOYEES WITHIN THE
09:01AM 6 SCOPE OF THEIR RESPONSIBILITIES. SO THAT WOULD BE 801(D)
09:01AM 7 ADMISSIONS.

09:01AM 8 BUT AS I SAID, YOUR HONOR, WE ALREADY HAVE THE BRADY
09:01AM 9 LETTER, WHICH IS AN 801(D) ADMISSION. AND WE'RE HAPPY TO
09:01AM 10 SUBMIT A SUPPLEMENTAL BRIEF ON THAT POINT, BUT THAT ONE IS NOT
09:01AM 11 A CLOSE QUESTION.

09:01AM 12 THE COURT: OKAY. THANK YOU.

09:01AM 13 MS. VOLKAR, GOOD MORNING.

09:01AM 14 MS. VOLKAR: GOOD MORNING, YOUR HONOR.

09:01AM 15 THE COURT: SO YOU HEAR ME TALKING ABOUT
09:01AM 16 MR. SONNIER'S TESTIMONY AND FOUNDATION AND WHAT WOULD HE
09:02AM 17 TESTIFY ABOUT, HOW WOULD THAT COME IN. THAT'S KIND OF WHAT I'M
09:02AM 18 INTERESTED IN.

09:02AM 19 I'M NOT SUGGESTING THAT I'M GOING TO ALLOW IT TO COME IN,
09:02AM 20 BUT THAT'S KIND OF THE ISSUE THAT IS BEFORE ME NOW AS I LOOK AT
09:02AM 21 THAT.

09:02AM 22 MS. VOLKAR: AND, YOUR HONOR, WE HAVE A DECLARATION
09:02AM 23 FROM MR. SONNIER AT ECF NUMBER 1158. I BELIEVE MY COLLEAGUE
09:02AM 24 CONFIRMED TODAY THAT THAT'S WHAT THEY INTEND HIM TO TESTIFY TO
09:02AM 25 AND ABOUT.

09:02AM 1 WE, OF COURSE, HAVE MANY CONCERNS, EVEN JUST READING
09:02AM 2 THROUGH THAT DECLARATION. WHAT THE PURPOSE OF OUR MOTION IS,
09:02AM 3 IS REGARDLESS OF THE TRUTH OR FALSITY OF WHAT IS IN THAT
09:02AM 4 DECLARATION, WHICH, OF COURSE, IS ITS OWN BATTLE AND BOTH SIDES
09:02AM 5 HAVE A LOT OF DISAGREEMENTS ABOUT THAT, IT'S JUST NOT RELEVANT.

09:02AM 6 THE COURT CAN TAKE EVERYTHING IN THAT DECLARATION TO BE
09:02AM 7 TRUE, AND IT HAS NO TENDENCY TO MAKE MORE OR LESS PROBABLE ANY
09:02AM 8 FACT OF CONSEQUENCE IN THIS TRIAL IN THE CHARGES AGAINST
09:02AM 9 MR. BALWANI, THE WIRE FRAUD AND CONSPIRACY TO COMMIT WIRE FRAUD
09:03AM 10 CHARGES.

09:03AM 11 AND SO I WOULD GO SO FAR AS TO SAY, EVEN IF THE DEFENSE
09:03AM 12 WERE TO PUT TOGETHER A FURTHER OUTLINE OF HOW THEY EXPECT THIS
09:03AM 13 TO COME IN, IT SIMPLY IS IRRELEVANT. THEY DON'T GET OVER THE
09:03AM 14 THRESHOLD FEDERAL RULE OF EVIDENCE 104 BAR, WHICH IS THE COURT
09:03AM 15 GETS TO DECIDE WHETHER OR NOT THIS EVIDENCE IS GOING TO BE
09:03AM 16 ADMISSIBLE, AND HERE IT'S NOT BECAUSE IT'S SIMPLY IRRELEVANT.

09:03AM 17 AND, OF COURSE, THERE ARE 403 CONCERNS AS WELL.

09:03AM 18 AS I LAID OUT IN THE PLEADING, THERE IS SOME 702, BUT A
09:03AM 19 LOT OF THAT TIES TOGETHER WITH THE RELEVANCE.

09:03AM 20 WHAT MY COLLEAGUE JUST MOST RECENTLY SAID IS ACTUALLY MORE
09:03AM 21 CONCERNING TO ME BECAUSE NOW WE'RE GETTING INTO EVEN MORE
09:03AM 22 ISSUES. MR. SONNIER WAS DISCLOSED TO THE GOVERNMENT AS AN
09:03AM 23 EXPERT IN MICROSOFT AS TO SQL DATABASES.

09:03AM 24 HOWEVER, MY COLLEAGUE JUST SAID HE'S A VETERAN OF FORENSIC
09:03AM 25 EVALUATIONS, AND HE SHOULD BE PERMITTED TO TESTIFY AS AN EXPERT

09:03AM 1 ABOUT BEST PRACTICES, AND WE SHOULD BE PERMITTED TO REFRESH HIS
09:04AM 2 RECOLLECTION ON THE STAND USING A SECRET SERVICES BEST
09:04AM 3 PRACTICES AND ELECTRONIC DATABASE COLLECTION AND FORENSICS.

09:04AM 4 THAT IS SO FAR FROM WHAT THEY DISCLOSED HIM AS AN EXPERT
09:04AM 5 AT THE OUTSET, THAT WE'RE REALLY DOWN THE ROAD QUITE A BIT, AND
09:04AM 6 NOW WE HAVE DISCOVERY AND DISCLOSURE CONCERNS AS WELL.

09:04AM 7 BUT LET'S STICK TO WHAT'S IN HIS ACTUAL DECLARATION AND
09:04AM 8 WHY THAT IS IRRELEVANT TO THIS CASE.

09:04AM 9 AS YOUR HONOR KNOWS, WHAT IS ALREADY IN EVIDENCE IS THE
09:04AM 10 FACT THAT THERE WAS AN LIS DATABASE, THAT IT CONTAINED SOME
09:04AM 11 DATA. IT DID NOT CONTAIN WHETHER OR NOT THE PATIENT RESULTS,
09:04AM 12 THE INDIVIDUAL PATIENT RESULTS WERE ACCURATE OR INACCURATE.

09:04AM 13 AND THEN, AS YOUR HONOR KNOWS BUT THE JURY DOES NOT, AT
09:04AM 14 SOME LATER POINT IN TIME, AFTER MULTIPLE SUBPOENAS, THE
09:04AM 15 GOVERNMENT ATTEMPTED TO GET A COPY OF THIS DATABASE BUT WAS
09:04AM 16 PROVIDED A NONFUNCTIONING COPY FROM THERANOS.

09:04AM 17 THE RECONSTRUCTION OR ABILITY TO RECONSTRUCT IT AFTER THAT
09:05AM 18 AUGUST 31ST, 2018 TIME PERIOD IS IRRELEVANT FOR THE REASONS
09:05AM 19 THAT YOUR HONOR HAS FOUND THREE TIMES BEFORE.

09:05AM 20 AND THE FIRST AND MOST IMPORTANT ONE IS AT THAT TIME IN
09:05AM 21 AUGUST OF 2018, THE GOVERNMENT HAD NO IDEA THAT THE LIS
09:05AM 22 DATABASE WAS, ONE, NOT PROVIDED IN THE FUNCTIONING VERSION,
09:05AM 23 AND, TWO, ABOUT TO BE DISMANTLED, AND AGAIN, FROM OUR
09:05AM 24 PERSPECTIVE, IMPOSSIBLE TO PUT BACK TOGETHER.

09:05AM 25 WHO DID KNOW WAS MR. BALWANI'S CONSULTANT WHO WAS ON THE

PHONE AND APPARENTLY WAS RETAINED TO TRY TO OBTAIN A COPY OF THIS LIS.

BUT AS MY COLLEAGUES HAVE JUST SAID, MR. BRECHER JUST SAID, THE DEFENSE DOESN'T HAVE A COPY OF THIS EITHER. SO EVEN IN THEIR FACTUAL WORLD THEY THOUGHT THIS WOULD BE USEFUL AND WANTED TO GET A COPY OF IT AND WERE UNABLE TO DO SO.

BUT NOW, YEARS LATER, THEY'VE HIRED AN EXPERT, WHO, AGAIN, THEORETICALLY, THEY COULD HAVE HIRED AT THE TIME. AND HE SAYS, THEORETICALLY, IT COULD HAVE BEEN PUT BACK TOGETHER, AND THE GOVERNMENT SHOULD HAVE DONE X, Y, Z STEPS TO DO SO.

IF THE EXPERT WAS SIMPLY GOING TO TESTIFY IN A THEORETICAL WORLD, ONE COULD PUT BACK TOGETHER THIS DATABASE, THAT MIGHT BE ONE THING. BUT THAT'S NOT WHAT THEY WANT HIM TO TESTIFY ABOUT.

THEY WANT, MR. BALWANI WANTS TO BE ABLE TO PUT THE GOVERNMENT ON TRIAL. BUT THE GOVERNMENT IS NOT ON TRIAL HERE.

OF COURSE, THE GOVERNMENT MUST MEET ITS BURDEN OF PROOF, BUT TO CHANGE INTO THE LANE THAT MY COLLEAGUES WANT TO CHANGE INTO, WHICH IS TO SAY THAT THE GOVERNMENT ACTED RECKLESSLY, NEGLIGENTLY, THAT THE GOVERNMENT -- THAT WE WANT TO PUT A LETTER BEFORE A WITNESS ON THE STAND AND SHOW THE PROSECUTOR'S SIGNATURE, WE WANT TO BE ABLE TO POINT THE FINGER ACROSS THE TABLE AND SAY, "LOOK AT HOW BAD THEY ARE, TOO," THAT'S NOT PERMISSIBLE AND NOT RELEVANT.

AND I WANT TO BE VERY CLEAR, ABSOLUTELY CRIMINAL DEFENDANTS CAN SAY THE GOVERNMENT HASN'T MET THEIR BURDEN OF

09:07AM 1 PROOF. WE FULLY ENDORSE THE OBLIGATIONS THAT WE HAVE TO MEET.

09:07AM 2 BUT THERE'S A DIFFERENCE BETWEEN THAT AND TRYING TO VEER

09:07AM 3 INTO "THE GOVERNMENT ACTED IN BAD FAITH." AND THE DEFENSE

09:07AM 4 RIGHT NOW IS TRYING TO VEER INTO "THE GOVERNMENT ACTED IN BAD

09:07AM 5 FAITH, THE PROSECUTION ACTED IN BAD FAITH, THE PROSECUTION

09:07AM 6 ACTED NEGLIGENTLY, THE PROSECUTION ACTED RECKLESSLY," AND FOR

09:07AM 7 TWO REASONS. ONE, IT HAS SIMPLY NOTHING TO DO WITH THE CHARGES

09:07AM 8 AT TRIAL. IT'S A COMPLETE DISTRACTION. IT'S A TOTAL SIDESHOW.

09:07AM 9 THAT'S WHERE A MINI TRIAL AND RULE 403 COMES IN.

09:07AM 10 BUT ON TOP OF THAT, YOUR HONOR HAS ALREADY DETERMINED

09:07AM 11 UNDER A LEGAL STANDARD OF REVIEW THAT THE GOVERNMENT DIDN'T ACT

09:07AM 12 IN BAD FAITH, THAT THE GOVERNMENT WAS AT WORST NEGLIGENT.

09:07AM 13 SO YOUR HONOR HAS ALREADY MADE THE LEGAL DETERMINATION

09:07AM 14 THAT MR. BRECHER WANTS TO RELITIGATE. AND NOW, WHAT THEY WANT

09:07AM 15 TO DO INSTEAD, IS TO RELITIGATE THOSE ISSUES BEFORE THE

09:07AM 16 GOVERNMENT WITHOUT ALL OF THE CONTEXT.

09:07AM 17 AND WHEN HE SAYS THAT WE WANT TO MAKE SURE WE'VE TALKED

09:07AM 18 ABOUT WHAT DOORS ARE CLOSED AND HOW WE CAN LIMIT IT, THEY WANT

09:07AM 19 TO SHOW ONE ANGLE OF THIS DISPUTE TO THE JURY. THEY WANT TO

09:08AM 20 SHOW JUST THE FACT THAT THEY THINK MAKE THE GOVERNMENT LOOK

09:08AM 21 POORLY, AND THEN THEY WANT TO BLOCK THE GOVERNMENT FROM BEING

09:08AM 22 ABLE TO GIVE THE FULL STORY THAT SHOWS THAT MR. BALWANI HAD

09:08AM 23 EQUAL OR GREATER ACCESS TO THIS MATERIAL AND SAT ON HIS HANDS.

09:08AM 24 AND ALSO, THAT THERANOS, THE COMPANY THAT HE ONCE UPON A

09:08AM 25 TIME WORKED FOR, IS THE CULPRIT FOR DESTROYING IT AND THE

09:08AM 1 REASON WHY IT'S NOT HERE.

09:08AM 2 AND AGAIN, I GO BACK TO THE FIRST OF THE SUBPOENAS WERE
09:08AM 3 ISSUED TO THERANOS WHEN HE WAS STILL THE CHIEF OPERATING
09:08AM 4 OFFICER, AND THAT'S GOING TO COME OUT IF WE GET INTO THIS LAND.

09:08AM 5 THE COURT: WELL, THAT'S WHAT I WAS CONCERNED ABOUT
09:08AM 6 ALSO IS HOW DOES THIS COME IN FROM THE DEFENSE SIDE? AND THEN
09:08AM 7 WHAT WOULD THE RESPONSE BE AS FAR AS REBUTTAL OR WHATEVER?

09:08AM 8 AND IT SEEMS LIKE THERE'S A LOT OF INFORMATION,
09:08AM 9 POTENTIALLY, OUT HERE. AND, AGAIN, I WANT TO AVOID MINI
09:09AM 10 TRIALS, BECAUSE THAT'S WHAT THIS LOOKS LIKE, IT WOULD BOIL DOWN
09:09AM 11 TO. MY SENSE IS THERE WOULD BE MULTIPLE WITNESSES THAT WOULD
09:09AM 12 BE CALLED BY BOTH SIDES ON THIS ISSUE.

09:09AM 13 MS. VOLKAR: AND IF I MAY BE HEARD ON THAT,
09:09AM 14 YOUR HONOR?

09:09AM 15 MY UNDERSTANDING IS THAT THE DEFENSE WANTS TO GET AROUND
09:09AM 16 THAT BY CALLING JUST MR. SONNIER AND HAVING ALL OF THESE FACTS
09:09AM 17 THAT THEY WANT PUT IN THROUGH THEM.

09:09AM 18 AND I GO BACK TO YOUR HONOR'S FIRST QUESTION, THAT'S NOT
09:09AM 19 THE PROPER FOUNDATION. THEY WANT TO USE THE BRADY LETTER AS A
09:09AM 20 FACTUAL BASIS TO GET SOME OF THIS INFORMATION BEFORE THE JURY.

09:09AM 21 I DON'T THINK I'VE EVER HEARD OF THAT BEFORE. AND MAYBE I
09:09AM 22 JUST HAVEN'T BEEN AROUND THE BLOCK LONG ENOUGH. MAYBE
09:09AM 23 YOUR HONOR HAS SEEN THAT, BUT THAT'S A NEW ONE TO ME.

09:09AM 24 AND THEY WANT TO GET IN FACTS, AS THEY CALL IT, THROUGH AN
09:09AM 25 EXPERT WITNESS, WHO IS AN EXPERT ON SQL DATABASES, NOT AS

09:09AM 1 THEY'VE NOTICED HIM, A FACT ON FORENSIC EVALUATION, NOT AN
09:09AM 2 EXPERT ON HOW THE GOVERNMENT COULD HAVE HANDLED THIS
09:09AM 3 INVESTIGATION, AND NOT AN EXPERT ON THE THOROUGHNESS OF AN
09:09AM 4 INVESTIGATION. THAT SIMPLY IS NOT THE EXPERT THAT THEY HAVE
09:10AM 5 NOTICED.

09:10AM 6 THEY HAVE NOTICED SOMEONE WHO IS A, QUOTE-UNQUOTE,
09:10AM 7 "EXPERT," AND WE WEREN'T CHALLENGING THAT, IN ITS SQL
09:10AM 8 DATABASES. THAT'S WHAT WE'RE NOT CHALLENGING.

09:10AM 9 ANYTHING BEYOND THAT, WE GET INTO TREACHEROUS TERRITORY.
09:10AM 10 AND I JUST DON'T SEE HOW THEY ARE GOING TO PUT ON THIS CASE
09:10AM 11 WITHOUT CALLING DOZENS OF MORE WITNESSES THAT THEY HAVEN'T
09:10AM 12 DISCLOSED TO US.

09:10AM 13 AND I THINK IT'S REALLY TELLING THAT THEY DISCLOSED HIM AS
09:10AM 14 ONE OF THEIR INITIAL WITNESSES AND SOME BACKGROUND THAT IS NOT
09:10AM 15 OTHERWISE BEFORE THE COURT.

09:10AM 16 WE RECEIVED ON THE THURSDAY NIGHT DISCLOSURE, ABOUT TWO
09:10AM 17 HOURS AFTER THE DEADLINE, A DISCLOSURE OF FOUR WITNESSES WITH
09:10AM 18 MR. SONNIER ON THE LIST.

09:10AM 19 MONDAY MORNING AROUND I BELIEVE IT WAS 11:00 A.M., WE GOT
09:10AM 20 A RENEWED DISCLOSURE WITH THREE TOTALLY DIFFERENT WITNESSES --
09:10AM 21 I'M SORRY, THREE TOTALLY DIFFERENT WITNESSES WITH ONE
09:10AM 22 EXCEPTION, MR. SONNIER.

09:10AM 23 MR. SONNIER IS THE ONLY WITNESS THAT WAS DISCLOSED ON THE
09:10AM 24 TWO DIFFERENT, BOTH LATE, BUT TWO DIFFERENT DISCLOSURES THAT WE
09:10AM 25 RECEIVED OF WITNESSES, WHICH IS HOW WE KNEW THAT THIS ISSUE WAS

09:10AM 1 COMING TO A HEAD VERY SOON. WE ACTED AS QUICKLY AS WE COULD TO
09:11AM 2 FILE THIS MOTION.

09:11AM 3 WE DON'T SEE WHAT WITNESSES THEY PLAN TO PUT ON BEFOREHAND
09:11AM 4 TO BRING IN ANY OF THESE FACTS, AND THE EXHIBIT LIST GIVES US
09:11AM 5 FURTHER CAUSE FOR CONCERN. THERE'S ALL OF THE MOTION PRACTICE
09:11AM 6 BETWEEN THE PARTIES, YOUR HONOR'S ORDER ON THE MOTION TO
09:11AM 7 SUPPRESS. IS THAT REALLY EVIDENCE THAT IS GOING TO COME IN
09:11AM 8 BEFORE THIS JURY?

09:11AM 9 SO WE HAVE A LOT OF CONCERNS. WE THINK THIS REALLY IS FAR
09:11AM 10 AFIELD FROM THE FACTS THAT ARE CURRENTLY AT ISSUE IN THIS CASE.

09:11AM 11 WE UNDERSTAND THAT THE DEFENSE WANTS TO PUT ON A DEFENSE
09:11AM 12 OF THEIR CHOOSING, BUT IT STILL HAS TO BE A RELEVANT DEFENSE,
09:11AM 13 IT HAS TO BE TETHERED TO THE CHARGES AGAINST MR. BALWANI. AND
09:11AM 14 THAT'S NOT WHAT WE'RE LOOKING AT HERE.

09:11AM 15 THE COURT: OKAY. THANK YOU.

09:11AM 16 IS HE A FORENSIC EXPERT?

09:11AM 17 MR. BRECHER: HE'S A VETERAN OF MANY FORENSIC
09:11AM 18 INVESTIGATIONS, YOUR HONOR. I DON'T KNOW IF HE --

09:11AM 19 THE COURT: IS HE A FORENSIC EXPERT? DO YOU INTEND
09:11AM 20 TO OFFER HIM AS A FORENSIC EXPERT?

09:11AM 21 MR. BRECHER: NOT AS A FORENSIC EXPERT, YOUR HONOR.

09:11AM 22 WE INTEND TO OFFER HIM PRECISELY FOR WHAT WE DISCLOSED
09:11AM 23 HIM AS, WHICH MS. VOLKAR SLIGHTLY MISSTATED. HE SAID, AND THIS
09:11AM 24 IS IN HIS DECLARATION, THAT HE'S AN EXPERT IN SQL SERVERS,
09:12AM 25 THEIR ENCRYPTION, AND THEIR RECOVERY, IN OTHER WORDS, HOW YOU

09:12AM 1 ENCRYPT THEM AND HOW YOU RECOVER THEM. AND THAT COVERS
09:12AM 2 EVERYTHING WE NEED TO COVER.

09:12AM 3 FRANKLY, YOUR HONOR, ALL WE NEED TO KNOW IS THAT THE
09:12AM 4 GOVERNMENT WAS ADVISED OF A WAY WHICH THEY COULD HAVE SECURED
09:12AM 5 THIS DATA, AND MR. SONNIER WOULD AGREE THAT WOULD HAVE WORKED.
09:12AM 6 WE DON'T NEED TO GO BEYOND THAT.

09:12AM 7 I DO WANT TO RESPOND TO A FEW ELEMENTS OF MS. VOLKAR'S
09:12AM 8 COMMENTS, AND I GUESS IT'S DAYS LIKE TODAY I'M GRATEFUL THAT
09:12AM 9 THERE'S A TRANSCRIPT BECAUSE THEY JUST DON'T BEAR ANY
09:12AM 10 RESEMBLANCE TO WHAT I JUST SAID A FEW MOMENTS AGO.

09:12AM 11 THE NOTION THAT THE DEFENSE WANTS TO ADMIT CHERRY PICKED
09:12AM 12 FACTS AND THEN BLOCK THE GOVERNMENT FROM PUTTING IN CONTEXT --
09:12AM 13 I BELIEVE I SAID THREE TIMES THIS MORNING THAT WE WANT TO MAKE
09:12AM 14 SURE THAT THE CONTEXT SURROUNDING THE ENCRYPTED COPY IS SHARED
09:12AM 15 WITH THE JURY SO THAT THEY UNDERSTAND FULLY THIS PICTURE.

09:12AM 16 THE DEFENSE EXPRESSES -- EXCUSE ME, THE GOVERNMENT
09:12AM 17 EXPRESSES INCREDULITY ABOUT THE USE OF A BRADY LETTER.

09:12AM 18 WELL, YOUR HONOR, I DON'T THINK USING AN 801(D) PARTY
09:13AM 19 ADMISSION AS EVIDENCE IS AT ALL UNUSUAL. WE LITERALLY HAD THIS
09:13AM 20 CONVERSATION LAST WEEK, AND MR. LEACH WAS STANDING UP IN
09:13AM 21 MS. VOLKAR'S SPOT SAYING, YOUR HONOR, I'M STUNNED. THESE ARE
09:13AM 22 STATEMENTS BY MR. BALWANI ABOUT THE FACTS IN THIS CASE. OF
09:13AM 23 COURSE THEY'RE ADMISSIBLE.

09:13AM 24 YOUR HONOR, THESE ARE STATEMENTS BY MR. LEACH NOT ONLY
09:13AM 25 ABOUT THE FACTS OF THIS CASE, BUT IN THIS CASE. OF COURSE

09:13AM 1 THEY'RE ADMISSIBLE.

09:13AM 2 THE COURT: WHAT ARE YOUR THOUGHTS ON THAT,
09:13AM 3 MS. VOLKAR?

09:13AM 4 MS. VOLKAR: I THINK IT'S IRRELEVANT. I THINK WE'RE
09:13AM 5 REALLY TALKING PAST EACH OTHER HERE. MR. BRECHER IS EXPLAINING
09:13AM 6 WHY IT'S NOT HEARSAY. I DID NOT HEAR MYSELF SAY THAT THE BRADY
09:13AM 7 LETTER IS HEARSAY. I'M SORRY, I'M MISSING THAT CONNECTION.

09:13AM 8 I'M SAYING IT'S ENTIRELY IRRELEVANT TO THIS CASE. AND
09:13AM 9 RELEVANCE RULE 401 COMES BEFORE RULE 108 FOR A REASON.
09:13AM 10 RELEVANCE IS THE THRESHOLD DECISION THAT THE COURT MUST MAKE.
09:13AM 11 WE ARE HERE TODAY TO ARGUE ABOUT HOW IRRELEVANT A LOT OF
09:13AM 12 THIS -- AND PARTICULARLY MR. SONNIER'S DECLARATION IS.

09:14AM 13 BUT THE BRADY LETTER, I WOULD ALSO ARGUE AND THE FACTS
09:14AM 14 THAT ARE INCLUDED THEREIN, IRRELEVANT. I HAVEN'T HEARD A
09:14AM 15 THEORY FROM MR. BRECHER THAT CHANGES THAT PERSPECTIVE.

09:14AM 16 IF I WERE ARGUING HEARSAY, SURE, MAYBE I WOULD HAVE TO EAT
09:14AM 17 THE WORDS OF MY COLLEAGUE, BUT THAT'S NOT WHAT I'M ARGUING
09:14AM 18 TODAY.

09:14AM 19 MR. BRECHER: THANK YOU, YOUR HONOR.

09:14AM 20 AND I THINK THAT OUR THEORY OF RELEVANCE IS PRECISELY THE
09:14AM 21 ONE THAT WE LAID OUT IN OUR PLEADINGS AND IT'S THE THEORY OF
09:14AM 22 RELEVANCE THAT HAS BEEN BLESSED REPEATEDLY BY THE SUPREME COURT
09:14AM 23 AND BY THE NINTH CIRCUIT, AND THAT IS, MS. VOLKAR SUGGESTS --
09:14AM 24 FIRST OF ALL, WE NEVER SAID WE WOULD ACCUSE THE GOVERNMENT OF
09:14AM 25 BAD FAITH. IN FACT, I THINK I SAID NEGLIGENCE OR RECKLESSNESS

09:14AM 1 AT THE MOST.

09:14AM 2 BUT THE SUGGESTION WAS, AND APPARENTLY IT WAS CONCERNING
09:14AM 3 TO THE GOVERNMENT, THAT WE MIGHT POINT THE FINGER AT THE
09:14AM 4 GOVERNMENT AND SAY LOOK AT WHAT THEY DIDN'T DO.

09:14AM 5 WELL, YEAH, THAT'S WHAT THE NINTH CIRCUIT EXPRESSLY
09:14AM 6 ALLOWED. IT IS ALLOWED IN EVERY CRIMINAL CASE IN WHICH THE
09:14AM 7 FACTS IMPLICATE IT, AND THE FACTS DO IMPLICATE IT HERE.

09:14AM 8 I HEARD A -- I GUESS TWO DIFFERENT CLAIMS. ONE WHICH
09:14AM 9 APPEARS FOR THE FIRST TIME IN THE GOVERNMENT'S REPLY BRIEF IN A
09:15AM 10 FOOTNOTE, WHICH SAYS THAT THE GOVERNMENT IS NOT ASKING THE
09:15AM 11 COURT TO DRAW ANY FACTUAL DETERMINATIONS ABOUT -- AT THE
09:15AM 12 PRELIMINARY STAGE, BUT INSTEAD, JUST TO MAKE THE LEGAL
09:15AM 13 DETERMINATION OF RELEVANCE.

09:15AM 14 THAT DOESN'T QUITE WORK, YOUR HONOR.

09:15AM 15 IN ORDER TO DO THAT, THE COURT HAS TO ASSUME, AND THIS IS
09:15AM 16 THE U.S. V. EVANS CASE FROM THE NINTH CIRCUIT, THE COURT HAS TO
09:15AM 17 ASSUME THAT THE EVIDENCE THAT WE'VE PUT IN IS ACCURATE AND
09:15AM 18 TRUE. THE COURT IS NOT TO WEIGH CREDIBILITY AT THESE 104
09:15AM 19 STAGES.

09:15AM 20 AND THE GOVERNMENT IS VERY MUCH ASKING, YOUR HONOR, TO
09:15AM 21 MAKE A FACTUAL DETERMINATION. I KNOW THAT BECAUSE THEY SAY SO.

09:15AM 22 IF YOU LOOK AT THE MOTION, THE GOVERNMENT -- THE ORIGINAL
09:15AM 23 MOTION, NOT THE REPLY, THE GOVERNMENT RECITES FOUR SEPARATE
09:15AM 24 TIMES THAT THE STANDARD THAT THEY'RE LOOKING TO IS A
09:15AM 25 PREPONDERANCE OF THE EVIDENCE STANDARD.

09:15AM 1 YOUR HONOR, THAT'S A FACTUAL STANDARD. A LEGAL CONCLUSION
09:15AM 2 DOESN'T REQUIRE EVIDENCE FROM EITHER SIDE.

09:15AM 3 AND, SECOND, THEY CITE A DECISION, UNITED STATES VERSUS
09:15AM 4 PEREZ, WHICH IS EXCLUSIVE ON THIS POINT. IT DISCUSSES RULE
09:16AM 5 104(B) AND PRELIMINARY FACTUAL DETERMINATIONS.

09:16AM 6 I ALSO WANT TO TURN TO THE POINT THAT THE GOVERNMENT
09:16AM 7 ALREADY -- EXCUSE ME, THAT THE COURT ALREADY DECIDED THIS
09:16AM 8 QUESTION. AND I'M, FRANKLY, BEFUDDLED BY THAT.

09:16AM 9 WHAT YOUR HONOR RULED IN DOCKET 1326, WAS THAT OUR MOTION
09:16AM 10 TO SUPPRESS WAS DENIED. THE COURT DIDN'T CREDIT MR. SONNIER'S
09:16AM 11 OPINION OVER THE 302'S OF ONE THERANOS EMPLOYEE AND ONE
09:16AM 12 THERANOS CONSULTANT, BUT THAT DOESN'T MEAN THAT THE JURY
09:16AM 13 DOESN'T GET TO DRAW A DIFFERENT CONCLUSION.

09:16AM 14 AND I WORRY SOMETIMES, YOUR HONOR, THAT WE'VE BEEN SO
09:16AM 15 FOCUSED ON THIS CASE, WHICH IS VERY DISTINCTIVE IN A LOT OF
09:16AM 16 WAYS, THAT WE SOMETIMES VEER AWAY FROM THE BASICS OF CRIMINAL
09:16AM 17 PRACTICE AS THEY GO ON IN COURTROOMS ALL ACROSS THE COUNTRY
09:16AM 18 EVERY SINGLE DAY.

09:16AM 19 YOUR HONOR, TONIGHT AFTER COURT IF I GET ARRESTED, PERHAPS
09:16AM 20 MS. VOLKAR WILL HAVE CALLED IN AN ANONYMOUS TIP, AND I MAKE
09:16AM 21 APPARENTLY SOME SELF-INCRIMINATING STATEMENT, I CAN GO TO THE
09:16AM 22 COURT, MY TRIAL JUDGE, AND I CAN SAY, YOUR HONOR, I WANT THAT
09:17AM 23 STATEMENT SUPPRESSED, THE COPS BEAT ME UP. AND WHAT WOULD
09:17AM 24 HAPPEN IS THERE WOULD BE AN EVIDENTIARY HEARING. AND THE COURT
09:17AM 25 CAN SIDE WITH THE OFFICERS. THE COURT CAN SAY, YOU KNOW WHAT,

09:17AM 1 I'M CREDITING THE OFFICERS, I'M NOT CREDITING YOU, YOUR
09:17AM 2 SELF-INCRIMINATING STATEMENT COMES IN.

09:17AM 3 SO FAR, THAT'S EXACTLY WHAT HAPPENED IN CONNECTION WITH
09:17AM 4 THE MOTION TO SUPPRESS HEARING. WE OFFERED ONE VERSION OF THE
09:17AM 5 EVENTS, AND THE GOVERNMENT OFFERED A DIFFERENT ONE, AND
09:17AM 6 YOUR HONOR CREDITED THE GOVERNMENT'S VERSION.

09:17AM 7 BUT THIS IS WHERE WE PART WAYS, YOUR HONOR. IF THAT
09:17AM 8 HAPPENS TO ME, I'M STILL ABSOLUTELY ALLOWED TO TELL THE JURY AT
09:17AM 9 TRIAL, YOU SHOULD NOT GIVE CREDENCE TO THAT STATEMENT BECAUSE
09:17AM 10 IT WAS COERCED, BECAUSE EVEN IF MY TRIAL JUDGE DIDN'T BELIEVE
09:17AM 11 ME, 12 JURORS MIGHT. THAT'S EXACTLY WHAT WE'RE DEALING WITH
09:17AM 12 HERE.

09:17AM 13 I CAN'T, YOUR HONOR, LET GO THE NOTION THAT MR. BALWANI
09:17AM 14 COULD HAVE DONE MORE OR COULD HAVE STOPPED THE DESTRUCTION OF
09:17AM 15 THE LIS.

09:17AM 16 FIRST OF ALL, IT WASN'T DESTROYED, AS MR. SONNIER
09:17AM 17 CONFIRMS. BUT MR. BALWANI DOESN'T HAVE THE POWER TO SEIZE THE
09:18AM 18 SERVERS. HE NEVER DID. THE GOVERNMENT CERTAINLY DOES.
09:18AM 19 ALTHOUGH, ODDLY, IN THEIR REPLY THEY SUGGEST THAT THAT QUESTION
09:18AM 20 IS IN DOUBT.

09:18AM 21 BUT, MR. BALWANI, I DON'T KNOW, I GUESS HE SHOULD HAVE
09:18AM 22 BROKEN IN, IN THE DEAD OF NIGHT TO THESE WAREHOUSES AT
09:18AM 23 IRON MOUNTAIN AND MADE OFF WITH THE SERVERS. TYPICALLY
09:18AM 24 PROSECUTORS FROWN ON THAT.

09:18AM 25 BUT THE ISSUE HERE, YOUR HONOR, IS THAT MR. BALWANI DID

09:18AM 1 CONSULT A CONSULTANT AND TRIED TO HIRE A CONSULTANT. WE PUT IN
09:18AM 2 THAT RETENTION LANGUAGE IN THE DECLARATION OF MR. COOPERSMITH
09:18AM 3 IN SUPPORT OF OUR OPPOSITION. AND THE CONTEXT, THE CHRONOLOGY
09:18AM 4 THAT THE GOVERNMENT HAS NEVER, EVER ACKNOWLEDGED IS THE POINT
09:18AM 5 THAT THE DAY BEFORE THE DISASSEMBLY, MR. CHANDRASEKARAN TOLD
09:18AM 6 MR. CADDENHEAD, THIS IS WHAT I NEED, I NEED A COPY OF THIS
09:18AM 7 DIRECTORY TO DO MY WORK.

09:18AM 8 AND THE NEXT DAY, MR. CADDENHEAD SAID, I'VE GOT THAT COPY,
09:18AM 9 ALL CLEAR TO SHUT DOWN. SO THERE'S NOTHING MORE THAT
09:19AM 10 MR. BALWANI COULD HAVE OR SHOULD HAVE DONE.

09:19AM 11 SECOND, IT WAS THE GOVERNMENT WHO WAS ADVISED BY A LIS
09:19AM 12 SUPERVISOR THAT YOU COULD HAVE GOTTEN THE SERVERS. THERE'S NO
09:19AM 13 SUGGESTION THAT MR. BALWANI RECEIVED THAT SAME ADVICE.

09:19AM 14 AND AT THE TIME THAT THE GOVERNMENT RECEIVED THAT ADVICE
09:19AM 15 FROM THEIR OWN TECHNICAL SUPPORT, MR. SONNIER SAYS THEY COULD
09:19AM 16 HAVE DONE THAT. THEY COULD HAVE DONE IT RIGHT THEN IN OCTOBER,
09:19AM 17 THEY COULD HAVE DONE IT FOR MONTHS AFTERWARDS. THAT
09:19AM 18 INFORMATION AND THOSE CLAIMS, IN EVALUATING THESE PRELIMINARY
09:19AM 19 ADMISSIBILITY QUESTIONS, HAVE TO BE BELIEVED BEFORE YOUR HONOR
09:19AM 20 CAN MAKE THE THRESHOLD RELEVANCE DETERMINATION.

09:19AM 21 THE COURT: SO TELL ME, WHAT DOES ALL OF THIS HAVE
09:19AM 22 TO DO WITH THIS CASE?

09:19AM 23 MR. BRECHER: WELL, YOUR HONOR, THIS IS SORT OF A
09:19AM 24 STUNNING CLAIM BY THE GOVERNMENT. BUT THE GOVERNMENT SEEMS TO
09:19AM 25 BE SUGGESTING THAT THE CENTRAL REPOSITORY OF PATIENT TESTING

09:19AM 1 DATA IS ONLY marginally relevant to a case about the accuracy
09:19AM 2 of patient tests.

09:19AM 3 I've never heard such a claim, your honor, but that's not
09:19AM 4 what --

09:19AM 5 THE COURT: IS THERE SOME DISPUTE ABOUT WHAT IS
09:20AM 6 ACTUALLY IN THE LIS AND WHAT CAN BE DONE WITH IT?

09:20AM 7 MR. BRECHER: THERE MAY BE SOME DISPUTE, YOUR HONOR.

09:20AM 8 THE GOVERNMENT POINTED TO TESTIMONY BY MS. CHEUNG AND
09:20AM 9 TESTIMONY THAT I DIDN'T THINK WAS ON POINT BY MS. BENNETT, BUT
09:20AM 10 THAT'S --

09:20AM 11 THE COURT: AND DR. ROSENDORFF.

09:20AM 12 MR. BRECHER: AND DR. ROSENDORFF.

09:20AM 13 BUT WHAT DR. ROSENDORFF SAID IS WHEN I WOULD RECEIVE
09:20AM 14 CLINICIAN CONCERNS, I WOULD QUERY THE LIS DATABASE IN
09:20AM 15 COMBINATION WITH OTHER INFORMATION. I WOULD LOOK TO PATIENT
09:20AM 16 TREND DATA, WHICH IS IN THE LIS AS HIS TESTIMONY CONFIRMS. I
09:20AM 17 WOULD LOOK TO QUALITY CONTROL DATA, WHICH IS IN THE LIS AS HIS
09:20AM 18 TESTIMONY CONFIRMS.

09:20AM 19 THE COURT: SO THIS GOES TO YOUR ARGUMENT, THE
09:20AM 20 DEFENSE ARGUMENT, THAT THE LIS ISN'T HERE, THEREFORE, LADIES
09:20AM 21 AND GENTLEMEN, YOU SHOULD HAVE A DOUBT ABOUT THE GOVERNMENT'S
09:20AM 22 CASE, THEIR ALLEGATIONS IN THE INDICTMENT AS TO THOSE COUNTS?

09:20AM 23 MR. BRECHER: AND ARGUMENT, YES, YOUR HONOR.

09:20AM 24 AND WE DON'T INTEND TO LAY ANY MORE FOUNDATION SUPPORTING
09:21AM 25 THAT. WE THINK DR. ROSENDORFF'S TESTIMONY GIVES US ALL WE NEED

09:21AM 1 TO ARGUE THAT POINT.

09:21AM 2 THE COURT: BUT YOU HAVE THAT NOW, DON'T YOU?

09:21AM 3 MR. BRECHER: WE -- YES, THAT'S PRECISELY THE POINT
09:21AM 4 I'M MAKING, YOUR HONOR.

09:21AM 5 BUT WHAT WE ARE ALLOWED TO MAKE -- AND AGAIN, THE
09:21AM 6 NINTH CIRCUIT AND THE SUPREME COURT HAVE MADE THIS CRYSTAL
09:21AM 7 CLEAR, IS THAT WE'RE ALLOWED TO SAY THE GOVERNMENT COULD HAVE
09:21AM 8 DONE MORE, AND THEN MR. SONNIER CAN SAY THAT IN TESTIMONY.

09:21AM 9 AND WE CAN SAY IN CLOSING, AND YOU KNOW WHAT, YOU SHOULD
09:21AM 10 CONCLUDE THAT THE GOVERNMENT SHOULD HAVE DONE MORE. THAT'S
09:21AM 11 BLACK LETTER LAW, YOUR HONOR.

09:21AM 12 THE COURT: IF THAT HAPPENS THEN, WHAT SHOULD THE
09:21AM 13 COURT DO ABOUT ECF PAGE 9 OF 1454, LINE 7 THROUGH 15?

09:21AM 14 MR. BRECHER: I'M SORRY, YOUR HONOR. LET ME JUST
09:21AM 15 PULL THAT UP.

09:21AM 16 MS. VOLKAR: COULD I HAVE THAT ONE MORE TIME,
09:21AM 17 PLEASE, YOUR HONOR.

09:21AM 18 THE COURT: SURE. IT'S 1454, PAGE 9, LINES 8
09:21AM 19 THROUGH 15.

09:21AM 20 MR. BRECHER: THANK YOU, YOUR HONOR. THAT'S
09:21AM 21 PRECISELY THE ISSUE THAT I WAS HOPING TO TAKE UP.

09:22AM 22 WE DO NOT DISPUTE THAT THE GOVERNMENT WOULD BE ENTITLED TO
09:22AM 23 PUT ON SOME SORT OF REBUTTAL CASE, IF INDEED THEY FEEL THEY
09:22AM 24 NEED TO.

09:22AM 25 BUT AGAIN, WE INTEND TO PUT INTO EVIDENCE THAT THE

09:22AM 1 GOVERNMENT WAS DELIVERED AN UNOPENABLE AND UNDECRYPTABLE COPY,
09:22AM 2 SO I DON'T KNOW THAT THEY NEED TO DO ANYMORE.

09:22AM 3 BUT THE IMPORTANT THING THAT MR. BALWANI NEEDS, AND,
09:22AM 4 FRANKLY, GIVEN THAT WE'VE PROFFERED SO MUCH OF WHAT
09:22AM 5 MR. SONNIER'S WOULD BE, WE THINK WE NEED SOME GUIDANCE FROM THE
09:22AM 6 COURT ON WHAT SORT OF REBUTTAL WE'RE LOOKING AT IN ORDER TO
09:22AM 7 MAKE A FAIR DECISION ON WHETHER TO CALL MR. SONNIER. IT HAS TO
09:22AM 8 BE CABINED IN CERTAIN WAYS.

09:22AM 9 THE GOVERNMENT HAS PROPOSED IN THEIR MOTION A LIST OF
09:22AM 10 WITNESSES AND CONCEPTS THAT SEEMS TO INCLUDE EVERY DENIZEN OF
09:22AM 11 THE BAY AREA EXCEPT FOR MY COUSIN DEBRA, AND THAT'S JUST
09:22AM 12 COMPLETELY INAPPROPRIATE.

09:22AM 13 THE COURT: I'M SORRY. EXCLUDING YOUR COUSIN DEBRA,
09:22AM 14 WHO ARE THEY TALKING ABOUT?

09:22AM 15 MR. BRECHER: THEY WANT TO CALL MR. CADDENHEAD AND
09:23AM 16 MR. CHUNG, C-H-U-N-G, WHICH I THINK IS RESPECTFULLY ABOVE
09:23AM 17 BOARD.

09:23AM 18 THEY WOULD LIKE TO CALL MR. CHANDRASEKARAN, WHICH I THINK
09:23AM 19 IS APPROPRIATE DEPENDING ON THE QUESTIONS THAT THEY ASK HIM.
09:23AM 20 WE THINK THERE ARE SOME QUESTIONS THAT WOULD BE OUT OF BOUNDS.

09:23AM 21 THEY APPARENTLY INTEND TO CALL AN UNTOLD NUMBER OF
09:23AM 22 LAWYERS FROM WILMER HALE.

09:23AM 23 THEY INTEND TO CALL JOHN MCCHESENEY, WHICH IS OPERATIONS
09:23AM 24 HEAD AT THERANOS, WHO IS SOMEONE WHO HAD NOTHING TO DO WITH THE
09:23AM 25 TECHNICAL UNDERSTANDINGS OF MR. SONNIER'S TESTIMONY, WHICH IS

09:23AM 1 WHAT THE GOVERNMENT COULD HAVE DONE.

09:23AM 2 THEY ALSO INTEND TO CALL DR. STEVEN MASTER AND
09:23AM 3 DR. KINGSHUK DAS APPARENTLY TO TALK ABOUT THE VALUE OF THE LIS,
09:23AM 4 BUT THAT WOULD JUST BE REPEATING PORTIONS OF THEIR
09:23AM 5 CASE-IN-CHIEF. MR. SONNIER IS NOT GOING TO GET INTO ANY OF
09:23AM 6 THAT.

09:23AM 7 SO WHERE ARE THE LINES DRAWN?

09:23AM 8 MR. SONNIER IS GOING TO SAY, IF YOUR HONOR PERMITS US TO
09:23AM 9 PUT ON HIS TESTIMONY, THAT THE GOVERNMENT KNEW THAT IT HAD AN
09:23AM 10 OPTION TO SEIZE THE SERVERS. AND HE'S GOING TO SAY, "IN MY
09:23AM 11 OPINION, IN MY EXPERT OPINION, THAT WOULD HAVE WORKED." THAT'S
09:24AM 12 IT. THAT'S ESSENTIALLY THE SUM TOTAL OF WHAT WE WANT FROM
09:24AM 13 MR. SONNIER. THERE WILL BE SOME CONTEXT TO ESTABLISH HIS
09:24AM 14 EXPERT CREDENTIALS AND SOME FACTUAL FOUNDATION TO EXPLAIN THIS
09:24AM 15 ISSUE OF THE ENCRYPTED COPY. BUT THAT'S ALL WE'RE GOING TO
09:24AM 16 SAY.

09:24AM 17 IF THE GOVERNMENT WANTS TO CALLING MR. CADDENHEAD AND
09:24AM 18 MR. CHUNG TO SAY, IN FACT, THE LIS, ONCE IT WAS DISASSEMBLED,
09:24AM 19 WOULD HAVE BEEN IMPOSSIBLE TO REASSEMBLE SO MR. SONNIER IS
09:24AM 20 WRONG, THAT'S FINE. THAT'S TRIAL. I HAVE NO OBJECTION TO
09:24AM 21 THAT.

09:24AM 22 IF THEY WANT TO CALL MR. CHANDRASEKARAN TO SAY, I DESIGNED
09:24AM 23 THE LIS, AND I THINK THAT IT WOULD HAVE BEEN IMPOSSIBLE TO
09:24AM 24 ASSEMBLE OR REASSEMBLE, THAT'S FINE. THAT'S NOT WHAT HE'S TOLD
09:24AM 25 THE GOVERNMENT IN HIS 302 OR IN THE RECORDING OF HIS INTERVIEW

09:24AM 1 THAT WE HAVE, BUT I GUESS WE'LL JUST HAVE TO SAVE THAT FOR
09:24AM 2 CROSS.

09:24AM 3 BUT IT'S WHEN YOU GO BEYOND THAT. IT'S THE SUGGESTION
09:25AM 4 THAT MR. BALWANI HAD SOME NEFARIOUS ROLE IN THIS WHOLE
09:25AM 5 SCENARIO, THAT'S COMPLETELY INAPPROPRIATE.

09:25AM 6 THE COURT: IS IT ADMISSIBLE THAT WHILE HE WAS COO
09:25AM 7 OF THE COMPANY, THEY RECEIVED SUBPOENAS FOR THIS MATERIAL?

09:25AM 8 MR. BRECHER: IT WOULD BE ADMISSIBLE IF IT WERE
09:25AM 9 TRUE, YOUR HONOR.

09:25AM 10 THE GOVERNMENT'S MOTION DOES A NEAT LITTLE TRICK HERE.
09:25AM 11 WHAT THEY SAY IS THERANOS RECEIVED A PRESERVATION ORDER FROM
09:25AM 12 THE S.E.C. WHILE MR. BALWANI WAS COO IN OCTOBER 2015. BUT THE
09:25AM 13 SUBPOENAS CAME LATER, AFTER MR. BALWANI'S DEPARTURE.

09:25AM 14 AND AS THE COURT KNOWS, OR SHOULD KNOW, AND I DON'T THINK
09:25AM 15 THE GOVERNMENT DISPUTES, ALL OF THE RELEVANT DATA WAS PRESERVED
09:25AM 16 WHILE MR. BALWANI WAS COO.

09:25AM 17 SO IF THEY WANT TO PUT THAT IN IF IT'S TRUE -- IT'S NOT,
09:25AM 18 BUT I GUESS THEY CAN DO THAT.

09:25AM 19 BUT --

09:25AM 20 THE COURT: SO THE PRESERVATION LETTER WOULD COME
09:25AM 21 IN?

09:25AM 22 MR. BRECHER: I DON'T SEE THE RELEVANCE OF THE
09:25AM 23 PRESERVATION LETTER, YOUR HONOR, BECAUSE MR. BALWANI COMPLIED
09:25AM 24 WITH IT.

09:25AM 25 THERE'S NOT A HINT ANYWHERE THAT HE DIDN'T. HE LEFT --

09:26AM 1 THE COURT: SO IS THE GOVERNMENT -- AS YOU TOLD ME
09:26AM 2 EARLIER THIS MORNING, YOU WANT TO BE FAIR TO THE GOVERNMENT.

09:26AM 3 SO IF WE GO DOWN THIS ROAD, SHOULDN'T THE GOVERNMENT BE
09:26AM 4 ENTITLED TO TELL AT LEAST WHAT THEY BELIEVE THE FULL STORY IS?

09:26AM 5 THEY REQUESTED MANY TIMES THIS SERVER, THIS DATABASE;
09:26AM 6 THEY WERE STALLED; THEY WERE STALLED; THEY WERE STALLED.

09:26AM 7 AND THEN FOUR DAYS BEFORE THE DECOMMISSIONING, THEY
09:26AM 8 RECEIVED WHAT IS PURPORTED TO BE, AND MAYBE THIS IS WHY THE
09:26AM 9 ATTORNEYS ARE ON THE WITNESS LIST, I SUPPOSE THEY WOULD BE
09:26AM 10 CALLED TO SAY, DID YOU GIVE US THIS?

09:26AM 11 YES, WE DID.

09:26AM 12 DID YOU MAKE REPRESENTATIONS ABOUT ITS INTEGRITY, OR DID
09:26AM 13 YOU TELL US THAT WE NEEDED A KEY, OR ANY OF THOSE TYPES OF
09:26AM 14 THINGS?

09:26AM 15 SHOULDN'T THEY BE ABLE TO TELL THAT STORY?

09:26AM 16 MR. BRECHER: SURE.

09:26AM 17 AND, YOUR HONOR, I DON'T PARTICULARLY CARE ABOUT THAT
09:26AM 18 STORY BECAUSE IT HAS NOTHING TO DO WITH MY CLIENT.

09:26AM 19 THE COURT: RIGHT.

09:26AM 20 MR. BRECHER: AND THE ISSUE IS, I REALLY DO HOPE
09:27AM 21 THAT I MADE CLEAR, WE INTEND TO DRAW OUT SOME OF THOSE FACTS
09:27AM 22 USING THE BRADY LETTER PRECISELY SO THE JURY CAN UNDERSTAND
09:27AM 23 THAT CONTEXT.

09:27AM 24 AS I SAID, WE DON'T SEE THE BASIS FOR ADMITTING A
09:27AM 25 PRESERVATION NOTICE ISSUED WHILE MR. BALWANI WAS AT THE COMPANY

09:27AM 1 ALMOST THREE YEARS, IN FACT, BEFORE THE DISASSEMBLY OF THE LIS
09:27AM 2 SYSTEM. THE TWO HAVE NOTHING TO DO WITH ONE ANOTHER.

09:27AM 3 AND WE DON'T SEE HOW THE GOVERNMENT SHOULD BE ALLOWED TO
09:27AM 4 SANDBAG THE DEFENSE BY PUTTING ON EVIDENCE ABOUT SYSTEMIC
09:27AM 5 INACCURACIES IN PATIENT TESTING DATA WHEN WE'RE NOT -- THAT'S
09:27AM 6 NOT WHAT WE'RE USING MR. SONNIER TO CHALLENGE.

09:27AM 7 THE LIMITS OF HIS TESTIMONY ARE PRECISELY, THAT THE
09:27AM 8 GOVERNMENT WAS TOLD THAT IT COULD HAVE DONE MORE, AND IF IT
09:27AM 9 WOULD HAVE DONE MORE, THAT WOULD HAVE WORKED. AGAIN, I KEEP
09:27AM 10 GOING BACK TO --

09:27AM 11 THE COURT: SO THEY'RE ENTITLED TO SAY WHY THEY
09:27AM 12 DIDN'T DO MORE?

09:27AM 13 MR. BRECHER: YES, I THINK THAT THAT'S FINE.

09:27AM 14 WHAT THEY CAN'T DO, THOUGH, IS PIN THE BLAME ON
09:27AM 15 MR. BALWANI.

09:27AM 16 AND I'VE SEEN A LOT OF THAT IN THE BRIEFING, YOUR HONOR.
09:27AM 17 AND IT'S A REALLY SINISTER INSINUATION THAT HAS NO BASIS IN LAW
09:28AM 18 OR IN FACT.

09:28AM 19 MR. BALWANI TRIED DOGGEDLY TO GET A COPY OF THIS
09:28AM 20 INFORMATION. THAT IS WHAT ALL OF THE DOCUMENTS SUPPORT.
09:28AM 21 THERE'S NO DOCUMENT THAT SUGGESTS OTHERWISE. AND THIS --

09:28AM 22 THE COURT: SO THEY CAN TEST THAT.

09:28AM 23 MR. BRECHER: I DON'T THINK SO, YOUR HONOR, BECAUSE
09:28AM 24 THERE'S NO GOOD BASIS FOR THE SUGGESTION THAT MR. BALWANI WAS
09:28AM 25 INVOLVED IN THE DESTRUCTION AND HAD NO LEGAL DUTY TO AVOID THIS

09:28AM 1 DISASSEMBLY.

09:28AM 2 BUT IF YOUR HONOR DISAGREES ABOUT THE GOOD FAITH BASIS FOR
09:28AM 3 THAT, THAT'S NOT THE HILL THAT I'M GOING TO DIE ON TODAY.

09:28AM 4 WHAT I DO WANT TO MAKE SURE IS CLEAR AND THE BOUNDARIES
09:28AM 5 THAT WE SHOULD ESTABLISH ARE, IT'S JUST NOT THE NUMBER OF
09:28AM 6 WITNESSES THAT THE GOVERNMENT NAMES. THEY ALSO SAY, WELL, WE
09:28AM 7 NEED TO GET INTO THE JOINT DEFENSE PRIVILEGE TO THE EXTENT ANY
09:28AM 8 EXISTS BETWEEN MS. HOLMES AND MR. BALWANI, OR MR. BALWANI AND
09:28AM 9 THERANOS. WE NEED TO INTRODUCE EVIDENCE OF ALL OF THE PRIOR
09:28AM 10 LITIGATION.

09:28AM 11 I JUST DON'T GET IT, YOUR HONOR. AND IT'S SOMEWHAT IRONIC
09:29AM 12 THAT WE'RE PROPOSING TESTIMONY THAT WOULD PROBABLY LAST 90
09:29AM 13 MINUTES TO 2 HOURS.

09:29AM 14 THE GOVERNMENT NAMES NINE WITNESSES AND FIVE CATEGORIES OF
09:29AM 15 INFORMATION AND SAYS, YOUR HONOR, THE DEFENSE IS THREATENING A
09:29AM 16 MINI TRIAL.

09:29AM 17 THAT DOESN'T WORK. THAT'S NOT WHAT IS GOING ON HERE.

09:29AM 18 WE'RE GOING TO ESTABLISH, WITH THE COURT'S PERMISSION,
09:29AM 19 THAT THE GOVERNMENT KNEW IT COULD HAVE DONE MORE. AND IF IT
09:29AM 20 COULD HAVE DONE AND IF IT HAD TAKEN THAT STEP, THAT WOULD HAVE
09:29AM 21 WORKED, AND WE WOULD HAVE HAD THIS LIS DATA.

09:29AM 22 THE COURT: THE BASIS OF THEIR KNOWLEDGE IS THIS ONE
09:29AM 23 INDIVIDUAL AT -- IT SOUNDS LIKE IT MAY HAVE BEEN A CHARETTE, OR
09:29AM 24 SOMETHING. AND WHAT SHOULD WE DO? AND IDEAS ARE BEING THROWN
09:29AM 25 ABOUT. I'M, OF COURSE, NOT STATING IT LIKE IT REALLY WAS, I'M

09:29AM 1 CERTAIN.

09:29AM 2 MR. BRECHER: OF COURSE.

09:29AM 3 THE COURT: BUT SOMEBODY HAD AN IDEA, AND THAT IDEA
09:29AM 4 WASN'T FOLLOWED. DIFFERENT THINGS, DIFFERENT AVENUES WERE
09:29AM 5 TAKEN. THAT'S WHAT YOU WANT TO GET IN.

09:29AM 6 MR. BRECHER: THAT'S WHAT WE WANT TO GET IN, YES.

09:29AM 7 THE COURT: AND YOU WANT TO SAY THAT BECAUSE OF
09:29AM 8 THAT, THEY HAD THE ABILITY TO DO IT.

09:29AM 9 MR. BRECHER: YES.

09:29AM 10 THE COURT: AND THEY DIDN'T, BECAUSE THEY DIDN'T
09:29AM 11 FOLLOW THAT SUGGESTION.

09:30AM 12 AND THEN YOUR EXPERT WILL SAY, YEAH, THEY SHOULD HAVE
09:30AM 13 LISTENED TO THAT PERSON BECAUSE IN MY OPINION IT COULD HAVE
09:30AM 14 BEEN DONE.

09:30AM 15 MR. BRECHER: OR I THINK HE MIGHT GO BROADER. I
09:30AM 16 THINK HE WOULD SAY IT WOULD HAVE BEEN DONE OR IT'S
09:30AM 17 OVERWHELMINGLY LIKELY TO HAVE BEEN SUCCESSFUL.

09:30AM 18 BUT I DO WANT TO RETURN, YOUR HONOR, BRIEFLY TO THE POINT
09:30AM 19 ABOUT WHAT HAPPENED AFTERWARDS AND WHAT HAPPENS NEXT WITH
09:30AM 20 MR. SONNIER, WHAT THE UPSHOT IS OF HIS TESTIMONY, BECAUSE I SEE
09:30AM 21 REPEATEDLY IN THE BRIEFING THAT BECAUSE THE LIS DATA STANDING
09:30AM 22 ALONE WOULD NOT BE ABLE TO TELL YOU WHETHER A PATIENT TEST
09:30AM 23 RESULT WAS ACCURATE OR INACCURATE, THAT THAT AFFECTS THE
09:30AM 24 ANALYSIS HERE. AND I HAVE TO TELL YOU, THAT ARTICULATION MAKES
09:30AM 25 NO SENSE WHATSOEVER.

09:30AM 1 THE COURT: THAT'S A WEIGHT ISSUE, ISN'T IT?

09:30AM 2 MR. BRECHER: WELL, FIRST OF ALL, IT DEFINITELY IS A
09:30AM 3 WEIGHT ISSUE.

09:30AM 4 BUT GOING BEYOND THAT, YOUR HONOR, THAT'S NOT WHAT ANY OF
09:30AM 5 THE CASES THAT ADDRESS THE RIGHT TO RAISE THE INTEGRITY OR
09:30AM 6 SLOPPINESS OF THE GOVERNMENT'S INVESTIGATION SAY MATTERS.

09:31AM 7 IT ALSO DOESN'T MAKE SENSE OF HOW WE UNDERSTAND
09:31AM 8 EXCULPATORY EVIDENCE IN OUR LAW. AND THE EXAMPLE THAT WE USE
09:31AM 9 IN OUR OPPOSITION, AND I THINK IT'S A POWERFUL ONE, IS THAT'S
09:31AM 10 LIKE SAYING THAT A FINGERPRINT DOESN'T MATTER. A FINGERPRINT
09:31AM 11 IS EXACTLY THE SAME IN A FORENSIC CASE AS THE LIS DATABASE. A
09:31AM 12 FINGERPRINT, YOUR HONOR, AS YOU KNOW, IS JUST A RESIDUE OF OIL
09:31AM 13 AND WATER. BY ITSELF, IT MEANS NOTHING. IT MEANS LESS THAN
09:31AM 14 NOTHING.

09:31AM 15 IT'S ONLY IN COMBINATION WITH OTHER PIECES OF EVIDENCE,
09:31AM 16 WHETHER A MATCHING FINGERPRINT FROM THE DEFENDANT OR FROM AN
09:31AM 17 ALTERNATIVE SUSPECT, OR A MATCH WITHIN A LAW ENFORCEMENT
09:31AM 18 DATABASE, THAT IT HAS EVIDENTIARY VALUE WHETHER INCULPATORY OR
09:31AM 19 EXCULPATORY. THIS IS THE REPOSITORY OF PATIENT TESTING DATA.

09:31AM 20 AND ONE THING THAT TROUBLES ME, YOUR HONOR, IS THAT I HAVE
09:31AM 21 NOT SEEN ANY ACKNOWLEDGEMENT BY THE GOVERNMENT OR ANY
09:31AM 22 EXPLANATION FOR ITS QUITE SUDDEN AND QUITE DRAMATIC ABOUT FACE
09:31AM 23 ON THE VALUE OF THIS TECHNOLOGY.

09:31AM 24 THE COURT: SO YOU WANT TO SAY THAT THE GOVERNMENT
09:31AM 25 HAD THIS, THEY DIDN'T TAKE ANY ACTION ON IT, AND IN THAT

09:32AM 1 INTERIM, THAT TIME PERIOD, IT WAS LOST AND IT CAN'T BE, IT
09:32AM 2 CAN'T BE RETRIEVED, AND BECAUSE OF THAT, LADIES AND GENTLEMEN,
09:32AM 3 WE DO NOT HAVE THE ABILITY TO BRING IT FORWARD, WHICH WE
09:32AM 4 BELIEVE WOULD HAVE SHOWN IN FULSOME MANNER THAT THE TESTING WAS
09:32AM 5 ACCURATE, ET CETERA, ET CETERA.

09:32AM 6 IS THAT --

09:32AM 7 MR. BRECHER: IN ESSENCE, YOUR HONOR.

09:32AM 8 I DON'T EVEN KNOW THAT WE NEED THE LAST PART. I THINK
09:32AM 9 THAT WE CAN ALLOW THE JURY TO INFER THAT.

09:32AM 10 THE COURT: OR IS IT, OR IS IT, YOU CAN'T TRUST
09:32AM 11 THEIR CASE BECAUSE THEY FUMBLERD IT? AND THEY DON'T GET INTO
09:32AM 12 THE END ZONE BECAUSE THEY FUMBLERD THE BALL AND IT WENT OUT OF
09:32AM 13 BOUNDS?

09:32AM 14 MR. BRECHER: WELL, BOTH ARE PERMISSIBLE UNDER
09:32AM 15 BINDING LAW, YOUR HONOR.

09:32AM 16 AND ON THAT ISSUE, YOUR HONOR, I WOULD DEFINITELY NEED TO
09:32AM 17 CONSULT WITH MY COLLEAGUES BEFORE COMMITTING TO WHAT WE WOULD
09:32AM 18 SAY AT CLOSING.

09:32AM 19 ALL I WOULD SAY IS BOTH OF THOSE AVENUES OF ARGUMENT ARE
09:32AM 20 PERMISSIBLE UNDER BINDING LAW.

09:33AM 21 THE COURT: OKAY. MS. VOLKAR.

09:33AM 22 MS. VOLKAR: THANKS, YOUR HONOR.

09:33AM 23 I WILL TRY TO TAKE THIS IN TURN. SO THERE ARE TWO THINGS,
09:33AM 24 AND I TRIED TO LAY THIS OUT IN THE INITIAL MOTION.

09:33AM 25 THERE IS THE RELEVANCE TO THE CASE-IN-CHIEF THAT THE

09:33AM 1 GOVERNMENT HAS PUT ON, THE CHARGES AGAINST MR. BALWANI, AND,
09:33AM 2 THAT IS, WE'VE HEARD FROM THE DEFENSE BEFORE, ONE OF THE
09:33AM 3 THEORIES OF RELEVANCE ABOUT LIS BECAUSE THE GOVERNMENT HAS
09:33AM 4 ALLEGED THERANOS WAS UNABLE TO PROVIDE ACCURATE AND RELIABLE
09:33AM 5 TEST RESULTS TO PATIENTS.

09:33AM 6 THEY HAVE DISAVOWED THAT THEORY, AND I JUST HEARD
09:33AM 7 MR. BRECHER SAY THAT AGAIN, AS A BASIS TO HAVE MR. SONNIER
09:33AM 8 TESTIFY AND AS LAID OUT IN THE PLEADINGS. THAT MAKES SENSE
09:33AM 9 BECAUSE HE HAS NO ABILITY TO SAY WHAT WAS IN OR NOT IN LIS.
09:33AM 10 GREAT.

09:33AM 11 BUT LOSING THAT SHAKE IN THE CHAIN DOES MATTER FOR THE
09:34AM 12 THOROUGHNESS OF THEIR INVESTIGATION BECAUSE LOOK AT THE CASES
09:34AM 13 THEY CITE TO, KYLES, HOWELL, CROSBY, ONE OF THE IMPORTANT
09:34AM 14 PARTS, AND, YES, THEY RELATE TO BRADY, BUT ONE OF THE IMPORTANT
09:34AM 15 PARTS IS WAS THIS MATERIAL TO THE DEFENSE?

09:34AM 16 SO YOU CAN'T JUST COMPLETELY IGNORE WHAT THE LIS WAS OR
09:34AM 17 WHAT EVIDENCE IT WOULD HAVE PROVIDED. YOU CAN'T IGNORE THAT.

09:34AM 18 NOW, LET'S GO TO THE THOROUGHNESS OF THE INVESTIGATION,
09:34AM 19 BECAUSE THAT'S THE ONLY THEORY OF RELEVANCE I HAVE HEARD.

09:34AM 20 I WANT TO TAKE A BIG STEP BACK. THE PARTIES VIGOROUSLY
09:34AM 21 DISAGREE ON A LOT OF THE FACTS. WE'VE RECOVERED A LOT OF THAT
09:34AM 22 GROUND THIS MORNING. I'M HAPPY TO GIVE THE GOVERNMENT'S
09:34AM 23 PERSPECTIVE ON ALL OF THEM, BUT ALL THE COURT NEEDS TO DECIDE
09:34AM 24 THIS MOTION IS WHETHER OR NOT ANYTHING THAT MR. SONNIER WOULD
09:34AM 25 SAY WOULD BE RELEVANT.

09:34AM 1 AND THE GOVERNMENT'S POSITION IS THAT NOTHING HE HAS TO
09:34AM 2 SAY IS RELEVANT TO THIS CASE. AND THE ONLY THEORY I HAVE HEARD
09:34AM 3 IS THIS THOROUGHNESS OF THE INVESTIGATION.

09:34AM 4 BUT THIS IS SOMETHING THAT THE GOVERNMENT DID -- AND I
09:34AM 5 ALSO HEARD MR. BRECHER SAY A MOMENT AGO, THE GOVERNMENT
09:35AM 6 COULDN'T TALK ABOUT THE PRESERVATION LETTERS OR SOMETHING LIKE
09:35AM 7 THAT BECAUSE IF IT WERE TRUE.

09:35AM 8 WELL, I FIND THAT -- I HAD TO CHUCKLE A LITTLE BIT HEARING
09:35AM 9 THAT FROM THE DEFENSE, BECAUSE IF IT WERE TRUE, THEN THERE'S A
09:35AM 10 REASON THAT THE GOVERNMENT WOULD BE ABLE TO GET IN A LOT OF
09:35AM 11 EVIDENCE THAT THE DEFENSE PROBABLY WOULD NOT LIKE.

09:35AM 12 SO I WANT TO TAKE A STEP BACK AND SAY, MR. BRECHER GAVE AN
09:35AM 13 EXAMPLE OF THE SUPPRESSION HEARING AND WHAT THE GOVERNMENT
09:35AM 14 WOULD BE ABLE TO -- OR WHAT THE DEFENDANT STILL WOULD BE ABLE
09:35AM 15 TO PRESENT AT TRIAL. THAT EXAMPLE IS ALL OF THE
09:35AM 16 PRE-AUGUST 2018 CONDUCT.

09:35AM 17 THE MOTION TO SUPPRESS WAS LARGELY ABOUT THE STEPS THAT
09:35AM 18 LED TO THE DESTRUCTION OF THE LIS IN AUGUST OF 2018. THAT IS
09:35AM 19 THE PERIOD WHERE THERE IS A LOT OF FACTUAL DISPUTE, AND IF THEY
09:35AM 20 PUT ON EVIDENCE, WE WOULD PROBABLY COUNTER IT.

09:35AM 21 BUT THAT'S NOT WHAT MR. SONNIER WANTS TO TALK ABOUT. HE
09:36AM 22 WANTS TO TALK ABOUT THE POST-AUGUST 2018. AND WHAT HE WANTS TO
09:36AM 23 SAY, IS THAT WHEN THE GOVERNMENT WAS GIVEN MULTIPLE AVENUES,
09:36AM 24 THEY CHOSE ONE, AND THEY CHOSE THE WRONG ONE.

09:36AM 25 BUT AGAIN, I GO BACK TO MR. BRECHER SAID AGAIN, HE'S NOT A

09:36AM 1 FORENSIC EVALUATION EXPERT. HE DOESN'T GET TO SAY OR COMMENT
09:36AM 2 ON WHAT THE GOVERNMENT SHOULD HAVE DONE DIFFERENTLY. THAT'S
09:36AM 3 NOT WHAT HE WAS NOTICED AS. THAT'S NOT WHAT HE'S AN EXPERT IN.

09:36AM 4 THE COURT: SO HE COULD SAY, HE COULD SAY, "I'M AN
09:36AM 5 EXPERT AND I DO BELIEVE THAT IT COULD HAVE BEEN RECONSTRUCTED"?
09:36AM 6 MS. VOLKAR: RIGHT.

09:36AM 7 THE COURT: THAT'S IT.

09:36AM 8 MS. VOLKAR: THAT'S THE GOVERNMENT'S PERSPECTIVE.
09:36AM 9 THAT IS WHAT IS IN HIS QUALIFICATIONS.

09:36AM 10 AND I WANT TO POINT OUT, AND I KNOW I ADDED THIS IN THE
09:36AM 11 FOOTNOTE, BECAUSE AGAIN, I AM TRYING TO STAY AWAY FROM DIGGING
09:36AM 12 TOO MUCH INTO THE FACTS, BUT MR. SONNIER'S DECLARATION,
09:36AM 13 ECF 1158, PARAGRAPH 17 SAYS, "I HAVE SEEN NOTHING TO SUGGEST
09:36AM 14 THAT THERANOS OR ITS LAW FIRM WILMER HALE, WOULD NOT HAVE
09:37AM 15 COOPERATED," PRESUMABLY WITH THE GOVERNMENT, "BY PROVIDING ANY
09:37AM 16 USER I.D.'S OR PASSWORDS OR CREATING ANY NEW USERS NEEDED."

09:37AM 17 HOW IS A SQL DATABASE EXPERT QUALIFIED TO SAY THAT?
09:37AM 18 I HAVE ANOTHER EXAMPLE, YOUR HONOR.

09:37AM 19 THE COURT: YOU'RE NOT GOING TO ASK HIM THAT, ARE
09:37AM 20 YOU, MR. BRECHER?

09:37AM 21 MR. BRECHER: NO.

09:37AM 22 MS. VOLKAR: IN PARAGRAPH 15, THIS ONE IS PROBABLY
09:37AM 23 HARDER FOR THE DEFENSE TO ANSWER, MR. SONNIER SAYS, "THERE IS
09:37AM 24 NOTHING THAT WOULD HAVE STOPPED THE GOVERNMENT FROM OBTAINING
09:37AM 25 POSSESSION OF EITHER OR BOTH THE DISK DRIVES AND SERVER

09:37AM 1 EQUIPMENT BEFORE OR LONG AFTER AUGUST 31ST, 2018."

09:37AM 2 THAT EXACT SAME STATEMENT IS TRUE OF MR. BALWANI. I KNOW
09:37AM 3 THAT THE DEFENSE DOESN'T WANT TO ADMIT THAT, BUT IT IS TRUE
09:37AM 4 THAT MR. BALWANI ALSO COULD HAVE OBTAINED THAT MATERIAL IF IT
09:37AM 5 WERE, IN FACT, POSSIBLE.

09:37AM 6 THE COURT: YOU'RE NOT GOING TO ASK HIM THAT, ARE
09:37AM 7 YOU?

09:37AM 8 MR. BRECHER: WELL, YOUR HONOR, WE ARE GOING TO ASK
09:37AM 9 HIM OR WE DO INTEND TO ASK HIM, WAS THE GOVERNMENT TOLD THAT
09:37AM 10 THIS IS SOMETHING THAT THEY COULD HAVE DONE?

09:38AM 11 YES.

09:38AM 12 WOULD THAT HAVE WORKED?

09:38AM 13 YES.

09:38AM 14 I DON'T KNOW IF THAT'S THE SAME THING, BUT I THINK THAT
09:38AM 15 THAT'S EXACTLY AS YOUR HONOR HAS ARTICULATED A FEW MINUTES AGO.

09:38AM 16 THE COURT: WELL, IN HIS OPINION, IT COULD HAVE BEEN
09:38AM 17 RECONSTRUCTED, WHATEVER THE TERM IS.

09:38AM 18 MR. BRECHER: YES. ALTHOUGH, I DO NEED TO PAUSE --
09:38AM 19 WELL, I APOLOGIZE. I SHOULD ALLOW MS. VOLKAR TO FINISH.

09:38AM 20 MS. VOLKAR: I COULD GO ON, YOUR HONOR, BUT THE
09:38AM 21 ANSWER IS THAT THE DEFENSE DOES INTEND TO GO THERE.

09:38AM 22 AND MR. SONNIER IS NOT QUALIFIED. THEY ARE TRYING TO
09:38AM 23 START A MINI TRIAL, BUT THEY WANT TO START A MINI TRIAL AND TIE
09:38AM 24 THE GOVERNMENT'S HANDS BEHIND THEIR BACK.

09:38AM 25 WHEN THEY SAY THINGS LIKE, "WE SHOULD BE ALLOWED TO

09:38AM 1 INTRODUCE THIS EVIDENCE AND HAVE SOMEONE SIT ON THE STAND AND
09:38AM 2 SAY THE GOVERNMENT SHOULD HAVE DONE X, BUT IN RESPONSE, THE
09:38AM 3 GOVERNMENT SHOULDN'T BE ALLOWED TO PUT IN THEIR REBUTTAL CASE
09:38AM 4 THE FACT THAT MR. BALWANI ALSO COULD HAVE DONE X."

09:38AM 5 THAT IS A LOPSIDED, UNTRUE VERSION OF THE FACTS.

09:38AM 6 AGAIN, THE PARTIES HOTLY CONTEST THE FACTS. I WANT TO GO
09:39AM 7 BACK TO THE LEGAL DETERMINATION OF RELEVANCE AND WHAT DOES IT
09:39AM 8 HAVE TO DO WITH THE CURRENT CHARGES.

09:39AM 9 MR. BALWANI WAS INDICTED BEFORE THE GOVERNMENT GOT THIS
09:39AM 10 NON-WORKING COPYING OF THE LIS.

09:39AM 11 PART OF THE REASON WHY THE COURT FOUND THE
09:39AM 12 POST-AUGUST 31ST, 2018 CONDUCT TO BE IRRELEVANT IS BECAUSE IT'S
09:39AM 13 BEEN THE GOVERNMENT'S POSITION ALL ALONG, WE DIDN'T NEED IT TO
09:39AM 14 PROSECUTE HIM. DID WE TRY TO GET IT? YES, FOR YEARS THE
09:39AM 15 GOVERNMENT TRIED TO GET IT. BUT WERE WE SUCCESSFUL? NO. DID
09:39AM 16 WE NEED TO TO PROSECUTE HIM? NO.

09:39AM 17 WHY IS THAT? BECAUSE WE HAD DR. DAS, AND WE HAD THE FACT
09:39AM 18 THAT THEY VOIDED ALL OF THE TESTS ON THEIR PROPRIETARY DEVICE,
09:39AM 19 THE EDISON.

09:39AM 20 WE HAVE THE CMS REPORT AND SARAH BENNETT. WE HAVE ALL OF
09:39AM 21 THESE OTHER INDICATIONS THAT WE CAN USE TO PROVE THE WIRE FRAUD
09:39AM 22 COUNTS.

09:39AM 23 AND WE HAD REAMS OF DATA THAT WERE PROVIDED TO US FROM THE
09:39AM 24 LIS, AND, IN FACT, THAT'S WHAT THE LAWYERS AT WILMER HALE TOLD
09:40AM 25 US WHEN THEY SAID WE DIDN'T NEED THE FULL LIS.

09:40AM 1 SO, YES, THERE IS A LOPSIDED STORY THAT IS GOING ON HERE.
09:40AM 2 AND WE ARE SAYING THAT IF THEY'RE GOING TO PUT IN ONE VIEW OF
09:40AM 3 IT, THE GOVERNMENT GETS TO EXPLAIN WHY IT DID DO A THOROUGH
09:40AM 4 INVESTIGATION, AND THAT'S GOING TO BE A LOT OF EVIDENCE THAT
09:40AM 5 MR. BALWANI HAS TRIED TO KEEP OUT OF THIS TRIAL.

09:40AM 6 MR. BRECHER: SO, YOUR HONOR, THAT'S SIMPLY NOT
09:40AM 7 TRUE. AND I'LL START WITH --

09:40AM 8 THE COURT: WHICH PART OF MS. VOLKAR'S STATEMENT?

09:40AM 9 MR. BRECHER: ALMOST ALL OF IT.

09:40AM 10 LET ME START WITH THE CLAIM THAT MR. BALWANI HAD THE SAME
09:40AM 11 OPPORTUNITIES.

09:40AM 12 I DON'T KNOW WHERE THAT COMES FROM, YOUR HONOR, BUT
09:40AM 13 MR. BALWANI HAD NO CONTROL OVER THERANOS WHEN IT DISASSEMBLED
09:40AM 14 THIS MACHINERY. MR. BALWANI DIDN'T RECEIVE A WARNING FROM AN
09:40AM 15 LIS SUPERVISOR SAYING, HEY, YOU SHOULD HAVE GOTTEN THE SERVERS.
09:40AM 16 THE GOVERNMENT DID.

09:40AM 17 THERE'S APPARENTLY A SERIOUS DISPUTES, OR PURPORTEDLY
09:40AM 18 SERIOUS DISPUTE, OVER WHETHER THE GOVERNMENT HAD THE POWER TO
09:40AM 19 SEIZE SERVERS.

09:41AM 20 THE GOVERNMENT HAS AN FBI AND A POSTAL INSPECTION SERVICE,
09:41AM 21 AND THEY HAVE TRUCKS, AND THEY CAN GET SEIZURE WARRANTS.

09:41AM 22 WHEN MR. BALWANI GOES IN, THAT'S CALLED THEFT. SO IT'S A
09:41AM 23 COMPLETELY DIFFERENT SITUATION.

09:41AM 24 LET'S SEE. THE MOTION TO SUPPRESS HEARING WAS ALL ABOUT
09:41AM 25 THE PRE-AUGUST 2018 COMMENT. I IMAGINE THAT'S A REFERENCE TO

09:41AM 1 THE MOTION TO SUPPRESS HEARING IN THE HOLMES CASE, BECAUSE AS I
09:41AM 2 RECALL AND I THINK YOUR HONOR WILL RECALL, OUR HEARING IN THIS
09:41AM 3 CASE ON FEBRUARY 8TH WAS ALL ABOUT WHAT MR. SONNIER SAID COULD
09:41AM 4 HAVE HAPPENED AFTER AUGUST 30TH OF 2018. AND HE SAID, IF THE
09:41AM 5 GOVERNMENT WANTED IT, THEY COULD HAVE HAD IT. AND WE DON'T
09:41AM 6 HAVE IT.

09:41AM 7 WE NOW SEE -- WE'RE NOW HEARING STATEMENTS ABOUT ALL OF
09:41AM 8 THE THINGS THAT THE GOVERNMENT DID OR COULD HAVE DONE TO SHOW
09:41AM 9 THEIR GOOD FAITH AND THEIR COMPETENCE. THAT'S FINE. I THINK
09:41AM 10 WE ALREADY SAID THAT IF THEY WANT TO PUT IN THAT EVIDENCE,
09:41AM 11 THAT'S FINE.

09:41AM 12 WHAT THEY CAN'T DO IS SUGGEST THAT MR. BALWANI HAD CONTROL
09:42AM 13 OVER THESE MATTERS. THERE'S NO GOOD FAITH BASIS FOR THAT.
09:42AM 14 THERE'S NO EVIDENCE SUPPORTING THAT.

09:42AM 15 ALL OF THE EVIDENCE SUGGESTS THAT MR. BALWANI HIRED
09:42AM 16 SOMEONE TO TRY TO GET THIS COPYING. THAT SOMEONE WAS TOLD BY
09:42AM 17 ONE OF THE WITNESSES THAT THE GOVERNMENT APPARENTLY PLANS TO
09:42AM 18 CALL, I'VE GOT THE DIRECTORY IF YOU WANT. ALL CLEAR TO SHUT
09:42AM 19 DOWN.

09:42AM 20 AND WHAT WE REALLY NEED, YOUR HONOR, IS TO GO BACK TO
09:42AM 21 BASICS HERE ON WHAT THE RELEVANCE OF THIS EVIDENCE IS.

09:42AM 22 AND AGAIN, THIS IS WHAT TROUBLES ME, THE GOVERNMENT HAS
09:42AM 23 NOWHERE TRIED TO DEFEND OR EVEN EXPLAIN ITS ABRUPT ABOUT FACE
09:42AM 24 ABOUT THE NEEDING OF THIS EVIDENCE.

09:42AM 25 LAST YEAR, WHAT THEY WERE TELLING THIS COURT IN FILINGS

09:42AM 1 WAS, THE LIS PROVIDED THE TOOLS, QUOTE, "TO SEARCH FOR SUCH
09:42AM 2 CRITICAL EVIDENCE AS ALL THERANOS BLOOD TESTS WITH VALIDATION
09:42AM 3 ERRORS." THESE ARE THE GOVERNMENT'S WORDS. THIS IS DOCKET
09:43AM 4 669.

09:43AM 5 "THE LIS HAD IMMENSE FUNCTIONALITY." THE GOVERNMENT'S
09:43AM 6 WORDS.

09:43AM 7 "THE DATABASE WAS CUSTOM MADE AND THOSE WHO POSSESSED
09:43AM 8 BACKDOOR ACCESS TO THE SQL DATABASE COULD QUERY THE DATABASE TO
09:43AM 9 PRODUCE SOPHISTICATED RESULTS THAT EXPLAINED WHAT THE DATA
09:43AM 10 SHOWED ABOUT THERANOS'S CAPABILITIES." THE GOVERNMENT'S WORDS.

09:43AM 11 THE GOVERNMENT'S WORDS SAID THAT "THE LIS IS WHERE THE
09:43AM 12 METAPHORICAL BODIES WERE BURIED."

09:43AM 13 THE ONLY THING THAT CHANGED BETWEEN WHEN THEY WROTE THOSE
09:43AM 14 WORDS AND WHAT THEY'RE SAYING NOW, WHICH IS, OH, THE LIS, IT'S
09:43AM 15 NOTHING, IS OUR EXPERT WROTE A DECLARATION SAYING, BY THE WAY,
09:43AM 16 YOU GUYS COULD HAVE HAD THIS IF YOU WANTED IT.

09:43AM 17 NOW, SUDDENLY, THEY'VE DONE A COMPLETE 180 WITH NO
09:43AM 18 EXPLANATION WHATSOEVER. THEY SHOULD BE BOUNDS BY THOSE WORDS,
09:43AM 19 AND THEY SHOULD BE MADE TO EAT THOSE WORDS. AND I'VE SEEN NO
09:43AM 20 EXPLANATION, OR EVEN ACKNOWLEDGEMENT, THAT THESE ARE THE THINGS
09:43AM 21 THAT THE GOVERNMENT WAS CLAIMING.

09:43AM 22 THAT IS WHAT WE ARE SAYING HERE, YOUR HONOR.

09:43AM 23 THIS IS IMPORTANT EVIDENCE. WE HAVE ALREADY LAID THE
09:44AM 24 FOUNDATION, ALL OF THE FOUNDATION THAT WE INTEND TO LAY TO MAKE
09:44AM 25 THAT POINT, AND WE ALSO INTEND TO HAVE AN EXPERT SAY, THE

09:44AM 1 GOVERNMENT WAS ADVISED OF A WAY TO SECURE THAT EVIDENCE AND IT
09:44AM 2 DIDN'T GO THAT ROUTE. THAT'S IT.

09:44AM 3 MS. VOLKAR: I'M HAPPY TO RESPOND TO THAT,
09:44AM 4 YOUR HONOR.

09:44AM 5 THE COURT: GO AHEAD.

09:44AM 6 MS. VOLKAR: I'LL JUST SAY THAT THE SAME PLEADING
09:44AM 7 THAT MR. BRECHER POINTS TO, AND THE COURT CAN READ IT, IS
09:44AM 8 EXACTLY WHY THE GOVERNMENT IS SO UPSET THAT THERANOS DESTROYED
09:44AM 9 IT AND DIDN'T TELL THE GOVERNMENT THAT IT DIDN'T GIVE IT A
09:44AM 10 WORKING COPY.

09:44AM 11 IT IS -- THERE WAS A LARGE TROVE OF DATA IN THERE, AND
09:44AM 12 THAT'S WHY WE'VE REQUESTED IT FOR THREE YEARS. I DON'T BELIEVE
09:44AM 13 I'VE SAID ANYTHING DIFFERENTLY THIS MORNING.

09:44AM 14 WE'VE ALSO SAID IN THAT EXACT SAME FILING THAT THE OTHER
09:44AM 15 EVIDENCE THAT WAS THE SUBJECT OF MS. HOLMES'S MOTION TO
09:44AM 16 SUPPRESS, MR. BALWANI ADOPTED IT, WAS ALL OF THE OTHER EVIDENCE
09:44AM 17 THAT THE GOVERNMENT HAD TO CONTINUE FORWARD WITH THIS
09:44AM 18 PROSECUTION.

09:44AM 19 IF THE DATABASE WAS THE END ALL BE ALL, WHICH THE
09:44AM 20 GOVERNMENT NEVER SAID EVEN IN THAT PRIOR PLEADING, THEN THE
09:45AM 21 GOVERNMENT WOULDN'T HAVE BEEN ABLE TO GO FORWARD WITH THE
09:45AM 22 PROSECUTION. IT DOESN'T MAKE ANY SENSE.

09:45AM 23 SO I JUST HAVE TO POINT OUT THAT, WHAT I THOUGHT WAS AN
09:45AM 24 OBVIOUS POINT.

09:45AM 25 AND THEN THE LAST THING I WANT TO SAY IS, MR. BRECHER GOES

09:45AM 1 BACK TO, WELL, THE GOVERNMENT HAS THE FBI, THE GOVERNMENT HAS,
09:45AM 2 AS MR. SONNIER SAYS IN HIS DECLARATION, COERCIVE METHODS THAT
09:45AM 3 THEY COULD USE TO OBTAIN THE SERVERS, AND MR. BALWANI DOESN'T
09:45AM 4 HAVE THOSE.

09:45AM 5 YOUR HONOR, DOES THAT REALLY HAVE PLACE IN THIS TRIAL,
09:45AM 6 "THE GOVERNMENT HAS COERCIVE METHODS"? AND WHY IS MR. SONNIER
09:45AM 7 QUALIFIED TO TALK ABOUT THAT?

09:45AM 8 AGAIN, THEY SAID HE'S NOT BEING OFFERED AS A FORENSIC
09:45AM 9 EXPERT. THAT MEANS THAT WHAT THEY REALLY WANT OUT OF HIM IS
09:45AM 10 BEYOND HIS EXPERTISE. IT'S NOT RELIABLE. THAT BRINGS 702
09:45AM 11 CONCERNS.

09:45AM 12 AND AGAIN, JUST GOING BACK TO BASIC RELEVANCE, IT'S ALL AT
09:45AM 13 A TIME PERIOD THAT IS PAST ANY TIME PERIOD THAT MATTERS, EVEN
09:45AM 14 WITH RESPECT TO THE THOROUGHNESS OF THE INVESTIGATION.

09:46AM 15 IF WE WANT TO BE REALLY BASIC, THE INVESTIGATION UP UNTIL
09:46AM 16 THE INDICTMENT, LED TO THE INDICTMENT WITHOUT THE LIS.

09:46AM 17 SO, AGAIN, I JUST THINK IT HAS NO -- AND THERE ARE A LOT
09:46AM 18 MORE REASONS THAT ARE STATED IN MY BRIEF, BUT IT JUST HAS
09:46AM 19 NOTHING TO DO WITH THE THOROUGHNESS OF THE INVESTIGATION AND
09:46AM 20 IT'S FAR AFIELD FROM THE CASES THEY CITE.

09:46AM 21 MR. BRECHER: SO, YOUR HONOR, THE GOVERNMENT IS
09:46AM 22 APPARENTLY NOW MOVING FROM THERE'S A FACTUAL DISPUTE ABOUT
09:46AM 23 WHETHER WE COULD HAVE DONE TO, WELL, MR. SONNIER IS NOT
09:46AM 24 QUALIFIED TO OPINE ON WHETHER WE COULD HAVE DONE IT.

09:46AM 25 I DON'T THINK THERE'S A SERIOUS QUESTION THAT THE

09:46AM 1 GOVERNMENT DOES HAVE COERCIVE METHODS TO OBTAIN INFORMATION,
09:46AM 2 BUT WE DON'T NEED TO DO WITH OUR EXPERT.

09:46AM 3 I HAVE ALREADY TOLD THE COURT WHAT WE INTEND TO SAY --

09:46AM 4 THE COURT: WELL, YOU PUT IT IN YOUR PLEADINGS, AND,
09:46AM 5 OF COURSE, IT DRAWS EVERYONE'S ATTENTION, INCLUDING MINE. AND
09:46AM 6 I SAID, OKAY, THEY WANT TO PUT HIM ON TO TALK ABOUT THE
09:46AM 7 GOVERNMENT COULD HAVE GOT AN ARMORED VEHICLE AND CRAMMED
09:46AM 8 THROUGH THE DOOR, OR SOMETHING. THEY HAVE BIG GOONS WHO CAN
09:46AM 9 COME OUT AND LOCK STEP THEIR WAY THROUGH THINGS. YOU'RE NOT
09:46AM 10 GOING TO DO THAT.

09:46AM 11 MR. BRECHER: WE'RE NOT GOING TO DO THAT,
09:46AM 12 YOUR HONOR. AND CERTAINLY NOTHING IN OUR PLEADINGS SUGGEST
09:47AM 13 ANYTHING ABOUT BIG GOONS OR KNOCKING DOWN DOORS.

09:47AM 14 THE COURT: NO, THAT'S MY WORDS.

09:47AM 15 BUT COERCIVE IS SOMETHING THAT -- YOU WANT THIS WITNESS TO
09:47AM 16 TESTIFY ABOUT COERCIVE TACTICS? I'M JUST -- I DON'T THINK
09:47AM 17 YOU'RE GOING TO DO THAT. THE COURT IS NOT GOING TO PERMIT YOU
09:47AM 18 TO DO THAT. AND I DON'T THINK IT WAS YOUR INTENT. IF THIS
09:47AM 19 WITNESS WAS GOING TO TESTIFY, HE'S NOT GOING TO TALK ABOUT
09:47AM 20 THAT.

09:47AM 21 MR. BRECHER: THAT'S CORRECT, YOUR HONOR, AND THAT'S
09:47AM 22 NOT CONSISTENT WITH THE REPRESENTATION THAT I MADE TODAY.

09:47AM 23 SECOND, YOUR HONOR, WE ALSO HAVE AMPLE MEANS TO GET THIS
09:47AM 24 EVIDENCE IN IF WE CAN SEE THOSE EMAILS, WHICH ARE BRADY, AND
09:47AM 25 THE SUBJECT OF A PENDING MOTION.

09:47AM 1 THE COURT: AND YOU WOULD GET THOSE IN HOW?

09:47AM 2 MR. BRECHER: YOUR HONOR, THAT WOULD BE EVEN EASIER

09:47AM 3 THROUGH MR. SONNIER, BECAUSE THEY'RE STATEMENTS BY GOVERNMENT

09:47AM 4 EMPLOYEES WITHIN THE SCOPE OF THEIR DUTIES. SO THEY'RE

09:47AM 5 NONHEARSAY. THEY'RE AUTHENTIC BY DINT OF BEING PRODUCED BY THE

09:47AM 6 OTHER PARTY. THERE IS CASE LAW TO THAT EFFECT. WE ARE HAPPY

09:47AM 7 TO PROVIDE IT.

09:47AM 8 THE COURT: SO WHAT YOU WOULD DO IS SHOW HIM THESE

09:47AM 9 DOCUMENTS, IS THAT WHAT YOU WOULD DO?

09:47AM 10 MR. BRECHER: AS I SAID, YOUR HONOR, WE'RE HAPPY TO

09:48AM 11 USE THE BRADY LETTER, BUT WE THINK IT'S CRITICAL IN ORDER TO

09:48AM 12 FULLY ASSESS AND BOTH WHERE WE WANT TO GO WITH THIS DEFENSE TO

09:48AM 13 SEE THE UNDERLYING DOCUMENTS, NOT THE GOVERNMENT'S SANITIZED

09:48AM 14 VERSION OF THEM.

09:48AM 15 I DON'T WANT TO RELITIGATE THE ARGUMENT THAT MS. VOLKAR

09:48AM 16 AND MR. COOPERSMITH HAD THE OTHER DAY BECAUSE I KNOW WE HAVE

09:48AM 17 OTHER ISSUES TO DEAL WITH.

09:48AM 18 THE COURT: NO.

09:48AM 19 MR. BRECHER: BUT I DO THINK THAT SEEING THOSE

09:48AM 20 DOCUMENTS IS ABSOLUTELY CRITICAL.

09:48AM 21 THE COURT: LET ME ASK YOU THIS, WE'VE BEEN TALKING

09:48AM 22 ABOUT THIS NOW FOR ABOUT 80 MINUTES OR SO, SOMETHING LIKE THAT.

09:48AM 23 WHAT ABOUT 403? THIS SOUNDS LIKE WE ARE HAVING A LITTLE

09:48AM 24 MINI TRIAL. YOU'RE GOING TO HAVE WITNESSES? IT'S A TENNIS

09:48AM 25 MATCH, ISN'T IT? THE BALL IS GOING BACK AND HOW MANY SETS ARE

09:48AM 1 WE GOING TO ENGAGE IN HERE? IT'S GOING TO EXTEND THE TRIAL.

09:48AM 2 AND YOU'RE GOING TO PUT THIS ON, AS YOU'VE SAID, AND

09:48AM 3 YOU'VE VERY KINDLY SAID, WELL, WE WELCOME THE GOVERNMENT

09:48AM 4 REHABILITATING THEMSELVES. AND THEY'LL PUT THEIR WITNESSES ON.

09:49AM 5 AND THEN YOU MIGHT HAVE SURREBUTTAL OR SOMETHING. I DON'T

09:49AM 6 KNOW.

09:49AM 7 MR. BRECHER: YOUR HONOR, THE AVAILABILITY, THE

09:49AM 8 UNAVAILABILITY, THE LOSS AND THE REASONS FOR THE LOSS OF

09:49AM 9 EVIDENCE THAT, AS BOTH SIDES HAVE ACKNOWLEDGED, IS CRITICAL

09:49AM 10 EVIDENCE, THAT'S NOT A MINI TRIAL. THAT IS THE TRIAL. THAT IS

09:49AM 11 PRECISELY WHAT THE SIXTH AMENDMENT GIVES MR. BALWANI THE RIGHT

09:49AM 12 TO RAISE.

09:49AM 13 AND THE IDEA THAT THE GOVERNMENT COULD TRY TO HOLD THAT

09:49AM 14 RIGHT HOSTAGE BY SAYING, IF YOU PUT ON THIS ONE TECHNICAL

09:49AM 15 EXPERT WHO IS SIMPLY GOING TO SAY, WELL, YOU KNOW, THE

09:49AM 16 GOVERNMENT WAS ADVISED THAT THEY COULD HAVE DONE THIS, AND THAT

09:49AM 17 WOULD HAVE WORKED. AND SAY IN RESPONSE, WE NEED TO CALL NINE

09:49AM 18 EXPERTS OR NINE WITNESSES AND RAISE FIVE OR SIX DIFFERENT

09:49AM 19 AREAS --

09:49AM 20 THE COURT: WELL, LET'S BE FAIR, THOUGH. YOU USED

09:49AM 21 THE WORD "COERCIVE" AND HE TESTIFIED IN "COERCIVE" IN YOUR

09:49AM 22 PLEADINGS. AND MS. VOLKAR RESPONDS IN KIND. THIS IS THE

09:49AM 23 TENNIS MATCH WE'RE TALKING ABOUT.

09:49AM 24 BUT I UNDERSTAND. YOU KNOW, IT'S NOT HYPERBOLE, BUT IT'S

09:49AM 25 PLEADINGS, AND I GET THAT.

09:49AM 1 I'M TRYING TO GET US BACK TO REALITY HERE ABOUT IF THE
09:50AM 2 COURT RECOGNIZES THAT THE DEFENSE HAS AN OPPORTUNITY TO
09:50AM 3 CHALLENGE, TO QUESTION THE GOVERNMENT'S CASE, FIRST OF ALL, I
09:50AM 4 THINK YOU HAVE AN OPPORTUNITY TO DO THAT NOW. YOU HAVE ENOUGH
09:50AM 5 TO DO THAT NOW.

09:50AM 6 MR. BRECHER: WE DO -- I'M SORRY, YOUR HONOR.

09:50AM 7 THE COURT: YOU DO, YOU HAVE ENOUGH TO DO THAT NOW.

09:50AM 8 THE QUESTION IS, IS THIS SOMETHING THAT IS CRITICAL FOR
09:50AM 9 YOUR DEFENSE ALSO?

09:50AM 10 I LOOK AT IT AND I SEE, WELL, IT WOULD CERTAINLY BENEFIT
09:50AM 11 AND HELP YOU.

09:50AM 12 OR IS IT, IS IT REALLY TRYING TO SULLY THE GOVERNMENT AND
09:50AM 13 THROW MUD ON THEM, EITHER PERSONALLY OR IN SOME WAY SULLY THEM
09:50AM 14 THAT IS NOT RELEVANT, THAT IS SOMEWHAT TANGENTIALLY RELEVANT?

09:50AM 15 AND IF WE'RE GOING TO GET INTO MUD SLINGING, YOU KNOW, BE
09:50AM 16 CAREFUL.

09:50AM 17 MR. BRECHER: SO, YOUR HONOR, I'M FULLY COGNIZANT
09:50AM 18 ABOUT THAT. I WILL SIMPLY SAY THAT AS FOR WHATEVER MUD IS
09:50AM 19 FLOWING IN THE DIRECTION OF THERANOS AND WILMER HALE, MY CLIENT
09:51AM 20 WAS NOT AT THERANOS AT THE TIME AND WILMER HALE DID NOT GIVE ME
09:51AM 21 A CALL BACK ALL OF THOSE YEARS AGO, SO I'M CONCERNED BY IT.

09:51AM 22 THE COURT: OKAY.

09:51AM 23 MR. BRECHER: BUT THE REAL ISSUE IS WHAT ARE WE
09:51AM 24 ALLOWED TO DO UNDER BINDING SUPREME COURT AND NINTH CIRCUIT
09:51AM 25 LAW?

09:51AM 1 AND WE ARE ALLOWED TO SAY, AND LAY THE EVIDENTIARY
09:51AM 2 FOUNDATION THROUGH TESTIMONY, AND THEN ARGUE TO THE JURY, YOU
09:51AM 3 KNOW WHAT, MEMBERS OF THE JURY, THE GOVERNMENT COULD HAVE DONE
09:51AM 4 MORE, AND FROM THAT, YOU SHOULD HAVE DOUBTS ABOUT THEIR
09:51AM 5 INVESTIGATION. THAT IS ALLOWED.

09:51AM 6 THIS COURT HAS NEVER CAST DOUBT UPON THAT. YOU ACTUALLY
09:51AM 7 STATED THAT TWICE IN YOUR RULINGS -- THREE TIMES IF YOU COUNT
09:51AM 8 THE HOLMES RULINGS. YOU EVEN, AS YOUR HONOR WILL RECALL,
09:51AM 9 RESERVED THE QUESTION OF WHETHER WE MAY BE ENTITLED TO AN
09:51AM 10 ADVERSE INFERENCE INSTRUCTION.

09:51AM 11 I DON'T KNOW HOW WE WOULD LAY THE FOUNDATION FOR SUCH AN
09:51AM 12 INSTRUCTION WITHOUT THE ABILITY TO PUT ON THIS EVIDENCE WHICH
09:51AM 13 BINDING LAW GIVES US THE RIGHT TO PUT ON.

09:51AM 14 THE COURT: AND JUST BECAUSE I USED THOSE WORDS,
09:51AM 15 THEY'RE NOT TALISMANIC. YOU SHOULDN'T THINK THAT, OH, HE'S
09:51AM 16 ALREADY GOING TO DO THIS.

09:51AM 17 MR. BRECHER: I DON'T TAKE IT THAT WAY, YOUR HONOR.
09:51AM 18 BUT EVEN PUTTING ASIDE THE COURT'S WORDS, I THINK WHAT MATTERS
09:52AM 19 ARE THE WORDS OF THE NINTH CIRCUIT AND THE WORDS OF THE SUPREME
09:52AM 20 COURT.

09:52AM 21 AND I WANT TO COMMENT FOR A MOMENT ABOUT SULLYING THE
09:52AM 22 GOVERNMENT OR THROWING MUD ON THE GOVERNMENT.

09:52AM 23 THE COURT: RIGHT.

09:52AM 24 MR. BRECHER: BUT MY INTENTION ISN'T TO INSULT AND
09:52AM 25 OUR INTENTION IS NOT TO INSULT THESE PROSECUTORS OR THESE

09:52AM 1 INVESTIGATORS, BUT THAT'S NOT THE NATURE OF QUESTIONING THE
09:52AM 2 FAIRNESS OR THE INTEGRITY OR THE THOROUGHNESS OF AN
09:52AM 3 INVESTIGATION, SOMETHING THAT THE DEFENDANT IS ENTITLED TO DO.

09:52AM 4 WE LIVE IN A LEGAL SYSTEM IN WHICH AS THE COURT KNOWS ALL
09:52AM 5 TOO WELL FROM OUR BIVENS JURISPRUDENCE, FEDERAL PROSECUTORS AND
09:52AM 6 FEDERAL LAW ENFORCEMENT AGENTS ARE, IN GENERAL, ALLOWED TO RUN
09:52AM 7 ROUGHSHOD OVER OUR CONSTITUTIONAL RIGHTS WITH NO CONSEQUENCES,
09:52AM 8 NO ACCOUNTABILITY. THAT'S NOT WHAT I'M HERE TO TALK ABOUT
09:52AM 9 TODAY.

09:52AM 10 BUT WHAT WE'RE BEING TOLD TODAY IS BEYOND -- APPARENTLY,
09:52AM 11 THAT LAW-FREE ZONE ISN'T ENOUGH FOR THE GOVERNMENT.
09:52AM 12 APPARENTLY, WHAT THEY ALSO NEED IS A WORLD IN WHICH A CRIMINAL
09:52AM 13 DEFENDANT, WHOSE LIBERTY IS AT STAKE, CAN'T CRITICIZE THE
09:52AM 14 INVESTIGATION AND SAY YOU COULD HAVE DONE MORE, AND I'VE GOT AN
09:52AM 15 EXPERT WHO IS HERE TO TELL YOU THAT YOU COULD HAVE DONE MORE.

09:53AM 16 AND THAT IS NOT CONSISTENT WITH THE SIXTH AMENDMENT. THAT
09:53AM 17 WOULD FUNDAMENTALLY IMPAIR MR. BALWANI'S SIXTH AMENDMENT
09:53AM 18 RIGHTS.

09:53AM 19 THE COURT: OKAY.

09:53AM 20 MS. VOLKAR: AGAIN, YOUR HONOR, THIS EXPERT IS NOT
09:53AM 21 QUALIFIED TO GIVE THAT OPINION. I DON'T KNOW -- AND THEN WE'RE
09:53AM 22 REALLY SQUARELY IN RULE 702 LAND, AND MAYBE WE NEED TO WRITE A
09:53AM 23 FURTHER DAUBERT BRIEFING ON THAT, IF NECESSARY.

09:53AM 24 BUT THIS EXPERT IS NOT QUALIFIED TO MAKE THAT ASSERTION
09:53AM 25 THAT MR. BRECHER JUST SAID. I THINK THAT'S REALLY BASIC. AND,

09:53AM 1 AGAIN, IT'S ENTIRELY IRRELEVANT AND DURING A RELEVANT TIME
09:53AM 2 PERIOD.

09:53AM 3 I WANT TO GO BACK TO JUST -- MY TEAMMATE REMINDED ME THAT
09:53AM 4 PART OF THE REASON WHY WE REFERENCED THE PRIOR LITIGATION, AND
09:53AM 5 YOU HEARD MR. LEACH SAY THIS EARLIER THIS WEEK, OR LAST WEEK,
09:53AM 6 WE DIDN'T WANT TO GET INTO THE PRIOR LITIGATION. WE UNDERSTAND
09:53AM 7 YOUR HONOR'S RULINGS.

09:53AM 8 BUT IN THAT PRIOR LITIGATION, MR. BALWANI WAS A DEFENDANT
09:53AM 9 FOR MANY YEARS AND HAD ALL OF THE TOOLS OF CIVIL DISCOVERY AT
09:54AM 10 HIS DISPOSAL THROUGHOUT THE PFM INVESTIGATION, THE ARIZONA
09:54AM 11 CONSUMER LITIGATION.

09:54AM 12 DURING THIS SAME TIME PERIOD THAT THE GOVERNMENT WAS
09:54AM 13 SENDING HIM SUBPOENAS, HE ALSO HAD A PERSONAL REASON TO GET
09:54AM 14 ACCESS TO, TO GET A FUNCTIONAL COPY OF THE LIS DATABASE, AND HE
09:54AM 15 ALSO HAD RULE 17 SUBPOENA POWERS IN THIS CASE WHEN HE KNEW HE
09:54AM 16 WAS UNDER INDICTMENT, WHICH IS, AGAIN, IS BEFORE THE DATABASE
09:54AM 17 GOES AWAY.

09:54AM 18 SO EVEN THOUGH THEY WANT TO DISTANCE ALL OF THAT STUFF,
09:54AM 19 THAT IS ALSO PART OF THE STORY OR COULD BE BECAUSE HE DID HAVE,
09:54AM 20 IF ANYTHING, MORE MOTIVE THAN THE GOVERNMENT TO GET ACCESS TO
09:54AM 21 THAT LIS DATABASE, IF IT ACTUALLY HAD EXCULPATORY EVIDENCE IN
09:54AM 22 IT, WHICH I KNOW IS ANOTHER DEBATE.

09:54AM 23 AND THE LAST THING I WANT TO SAY IS THAT I THINK THE COURT
09:54AM 24 GETS THAT THIS IS REALLY -- IT IS A MUD SLINGING CONTEST. AND
09:54AM 25 THE DEFENDANT WANTS TO SAY I DID BAD THINGS, AND LIED TO

09:54AM 1 PEOPLE, AND I GOT THEIR MONEY FOR IT, AND I WANT TO SHOW THAT
09:54AM 2 THE GOVERNMENT IS BAD, TOO, BECAUSE THEY COULD HAVE GOTTEN THIS
09:55AM 3 EVIDENCE THAT IS OF QUESTIONABLE USEFULNESS. I MEAN, AGAIN, I
09:55AM 4 KNOW IT HAD PATIENT RESULTS AND DATA IN IT. BUT WOULD IT HAVE
09:55AM 5 ACTUALLY HAD SOMETHING MORE BENEFICIAL THAN WHAT WE HAVE SEEN
09:55AM 6 IN THIS TRIAL? THAT IS STILL AN OPEN QUESTION, AND NO ONE WILL
09:55AM 7 KNOW THE ANSWER BECAUSE IT'S PERMANENTLY DESTROYED.

09:55AM 8 MR. BRECHER: BRIEFLY, YOUR HONOR.

09:55AM 9 FIRST, THE NOTION THAT THE DEFENDANT WANTS TO SHOW
09:55AM 10 SOMETHING BECAUSE HE WANTS TO SAY TO THE JURY, I LIED TO PEOPLE
09:55AM 11 AND GOT THEIR MONEY FOR IT, I WON'T DIGNIFY THAT WITH A
09:55AM 12 RESPONSE. I DON'T THINK THAT IS GOING TO FEATURE PROMINENTLY
09:55AM 13 IN OUR CLOSING ARGUMENT.

09:55AM 14 SECOND, THE POINT ABOUT CIVIL LITIGATION, THERE'S A
09:55AM 15 DIFFERENCE HERE, YOUR HONOR. MR. BALWANI WAS NOT ADVISED ABOUT
09:55AM 16 AN ALTERNATIVE WAY OF SECURING THIS DATA. THE GOVERNMENT WAS,
09:55AM 17 AND THAT IS PRECISELY WHAT MR. SONNIER IS GOING TO TESTIFY
09:55AM 18 ABOUT IF SO PERMITTED.

09:55AM 19 LAST, I WANT TO SPEAK TO -- SECOND TO LAST. I APOLOGIZE.
09:55AM 20 I WANT TO TALK ABOUT DISCOVERY FOR A MOMENT BECAUSE THE
09:55AM 21 GOVERNMENT TEED IT UP, AND I THINK IT'S APPROPRIATE TO OFFER
09:55AM 22 SOME RESPONSE.

09:55AM 23 THE SCOPE OF ANY REBUTTAL BY THE GOVERNMENT. THE COURT
09:55AM 24 NOW KNOWS BASED ON THE EXTENSIVE, I THINK MORE EXTENSIVE
09:56AM 25 REPRESENTATIONS ABOUT THE COURSE OF DIRECT THAN CRIMINAL

09:56AM 1 DEFENDANTS USUALLY OFFER, PRECISELY WHAT MR. SONNIER IS GOING
09:56AM 2 TO SAY. IT DOESN'T ALWAYS RESEMBLE WHAT THE GOVERNMENT CLAIMS
09:56AM 3 HE'S GOING TO SAY, BUT THAT'S FINE.

09:56AM 4 WHAT IS FAIR REBUTTAL? IF THEY WANT TO CALL
09:56AM 5 MR. CADDENHEAD AND MR. CHUNG TO SAY, NO, YOU COULDN'T HAVE
09:56AM 6 REASSEMBLED THE DATA, THAT'S OKAY. THAT'S FINE.

09:56AM 7 IF THEY WANT TO CALL MR. CHANDRASEKARAN TO SAY THE SAME
09:56AM 8 THING, AND TO ADD THE FACT THAT MR. CHANDRASEKARAN ALSO
09:56AM 9 DESIGNED AND MAINTAINED THE DATABASE, SOMETHING THAT NEITHER
09:56AM 10 CADDENHEAD OR CHUNG CAN CLAIM, THAT'S FINE, AS LONG AS THERE'S
09:56AM 11 NO SUGGESTION THAT MR. BALWANI WAS SOMEHOW INVOLVED IN THE
09:56AM 12 DISASSEMBLY, WHICH AGAIN, THERE IS NO GOOD FAITH BASIS FOR THAT
09:56AM 13 INSINUATION, THAT'S FINE.

09:56AM 14 BUT A COUPLE OF THINGS THAT CAN'T HAPPEN. ONE, IS GETTING
09:56AM 15 INTO THE EXISTENCE OR LACK OF EXISTENCE OF JOINT DEFENSE
09:56AM 16 PRIVILEGES; GETTING INTO UNRELATED -- GETTING INTO RELATED
09:57AM 17 CIVIL LITIGATION FOR ALL OF THE 403 REASONS THAT YOUR HONOR
09:57AM 18 ALREADY IDENTIFIED DURING THE COLLOQUY THAT MS. WALSH HAD WITH
09:57AM 19 MR. LEACH LAST WEEK; AND MOST CRITICALLY REALLY, SANDBAGGING
09:57AM 20 THE DEFENSE WITH THIS IDEA THAT YOU'RE NOT GOING TO PUT IN
09:57AM 21 ANYTHING NEW, DEFENSE, ABOUT WHAT LIS WAS OR WHAT IT COULD DO,
09:57AM 22 BUT IF YOU SAY THE GOVERNMENT COULD HAVE HAD IT, WE'RE GOING TO
09:57AM 23 CALL A COUPLE OF EXPERT WITNESSES TO TELL YOU THAT THE PATIENT
09:57AM 24 TESTING RESULTS WERE SYSTEMATICALLY UNRELIABLE. THAT'S NOT
09:57AM 25 REBUTTAL, YOUR HONOR. THAT'S REPEATING PORTIONS OF THE

09:57AM 1 CASE-IN-CHIEF THAT THEY COULD HAVE PUT IN HAD THEY CHOSEN TO DO
09:57AM 2 SO, AND IT'S WAITING TO DO SO UNTIL THE CONTEXT OF WHICH
09:57AM 3 MR. BALWANI HAS NO CHANCE TO RESPOND. WE DON'T GET A
09:57AM 4 SURREBUTTAL CASE.

09:57AM 5 IT SIMPLY HAS NOTHING TO DO WITH MEETING THE ALLEGATIONS
09:57AM 6 AND THE TESTIMONY THAT WE EXPECT TO OFFER THROUGH MR. SONNIER.
09:57AM 7 AND WE HOPE THE COURT WILL PROVIDE US SOME CLARITY ON THAT
09:58AM 8 ISSUE.

09:58AM 9 LAST, YOUR HONOR --

09:58AM 10 THE COURT: WOULD THEY BE ABLE TO, THE GOVERNMENT,
09:58AM 11 BE ABLE TO PUT INTO EVIDENCE A SCENARIO OR FACTS SUCH THAT THEY
09:58AM 12 COULD RESPOND TO THE QUESTION, WHY DIDN'T THEY DO THIS? THEY
09:58AM 13 DIDN'T. THEY HAD THIS AND THEY COULD HAVE, MR. SONNIER WILL
09:58AM 14 SAY. AND, FOR EXAMPLE, WOULD THEY BE ABLE TO PUT SOMEBODY ON
09:58AM 15 TO SAY, WELL, WE DIDN'T DO IT BECAUSE THEY TOLD US WE HAD THE
09:58AM 16 REAL THING AND WE TRUSTED THAT?

09:58AM 17 MR. BRECHER: YES, THEY COULD DO THAT.

09:58AM 18 AND AGAIN, YOUR HONOR, AS I THOUGHT I SAID, WE PLANNED TO
09:58AM 19 INTRODUCE THAT CONTEXT THROUGH MR. SONNIER TO MAKE SURE THE
09:58AM 20 JURY KNOWS, YOU KNOW, THE BACKGROUND AGAINST WHICH WE'RE
09:58AM 21 OPERATING HERE.

09:58AM 22 THE COURT: OKAY.

09:58AM 23 MR. BRECHER: AND THE LAST POINT, YOUR HONOR, IS
09:58AM 24 THERE'S BEEN SOME DISCUSSIONS ABOUT DISCOVERY. THIS IS MAYBE
09:58AM 25 THE THIRD TIME IT'S BEEN ALLUDED TO AND IT'S COME UP A FEW

09:58AM 1 TIMES IN BRIEFS. I WANT TO MAKE SURE THAT WE'RE ON THE SAME
09:59AM 2 PAGE ABOUT THE DEFENDANT'S DISCOVERY OBLIGATIONS BECAUSE WE
09:59AM 3 BELIEVE WE HAVE MET THEM.

09:59AM 4 AND THE GOVERNMENT HASN'T REALLY ARTICULATED WHY THEY
09:59AM 5 THINK THEY'RE ENTITLED TO CERTAIN INFORMATION. THEY'VE MADE
09:59AM 6 SOME REFERENCES TO RULE 26.2. SO I JUST WANT TO DIVE --

09:59AM 7 THE COURT: FRIDAY WE TALKED, AND THERE WAS THIS
09:59AM 8 DISCUSSION, AND I ASKED YOU -- AND I THINK BOTH SIDES SAID
09:59AM 9 WE'LL TALK WITH THE GOVERNMENT, AND WE'LL GIVE THEM WHAT THEY
09:59AM 10 NEED. IT SEEMS LIKE THERE WAS AGREEMENT ON THAT, BUT
09:59AM 11 APPARENTLY NOT.

09:59AM 12 MR. BRECHER: WELL, YOUR HONOR, WE THINK WE HAVE
09:59AM 13 ALREADY COMPLIED WITH OUR DISCOVERY OBLIGATIONS. AND I JUST
09:59AM 14 WANT TO REMIND THE COURT THAT --

09:59AM 15 THE COURT: WELL, THEY SAID THEY DIDN'T GET
09:59AM 16 ANYTHING.

09:59AM 17 MR. BRECHER: FIRST OF ALL, THAT IS NOT TRUE. THE
09:59AM 18 GOVERNMENT HAS GOTTEN SOME MATERIAL.

09:59AM 19 MS. VOLKAR: WE GOT A SECRET SERVICE BEST PRACTICES
09:59AM 20 MANUAL.

09:59AM 21 MR. BRECHER: THEY GOT A LOT MORE THAN THAT,
09:59AM 22 YOUR HONOR. I THINK IT'S ABOUT A THOUSAND PAGES OF MATERIAL.

09:59AM 23 BUT PUTTING ASIDE THAT, THERE'S NOTHING IN RULE 26.2 THAT
09:59AM 24 ENTITLES THE GOVERNMENT TO WHAT I THINK THEY'RE ASKING FOR.

09:59AM 25 I WANT TO JUST REMIND THE COURT OF WHERE WE LANDED

09:59AM 1 PROCEDURALLY IN THE HOLMES TRIAL BECAUSE THIS WAS DISCUSSED
09:59AM 2 ABOUT THREE TIMES, AND YOUR HONOR NEVER RULED FOR THE
10:00AM 3 GOVERNMENT, AND THAT'S BECAUSE THE LANGUAGE OF THE RULE IS
10:00AM 4 QUITE CLEAR.

10:00AM 5 YOU MAY RECALL A COLLOQUY, THERE WERE SEVERAL, BUT THE ONE
10:00AM 6 THAT STICKS OUT MOST IN MY MIND IS THE ONE BETWEEN MR. LEACH
10:00AM 7 AND MS. SAHARIA.

10:00AM 8 THE GOVERNMENT SAID, YOUR HONOR, WE DON'T HAVE THEIR
10:00AM 9 INTERVIEW SUMMARIES OF THEIR WITNESSES.

10:00AM 10 AND MS. SAHARIA POINTED OUT THE LANGUAGE OF F.R.C.P. 26.2
10:00AM 11 AND SUBSECTION (F) LAYS OUT THE DEFINITION OF STATEMENTS UNDER
10:00AM 12 THAT RULE, AND IT INCLUDES STATEMENTS THAT ARE MADE, SIGNED OR
10:00AM 13 ADOPTED BY THE WITNESS, IT INCLUDES EITHER RECORDINGS OR
10:00AM 14 SUBSTANTIALLY VERBATIM TRANSCRIPTS OF WITNESS STATEMENTS, AND
10:00AM 15 IT INCLUDES GRAND JURY TESTIMONY, WHICH WE OBVIOUSLY WOULDN'T
10:00AM 16 HAVE ACCESS TO.

10:00AM 17 THERE'S NOTHING ABOUT THE DEFENDANT'S INTERVIEWS THAT
10:00AM 18 WOULD FALL INTO ANY OF THOSE CATEGORIES.

10:00AM 19 AND I THINK THAT WHEN THE GOVERNMENT WAS CONFRONTED WITH
10:00AM 20 THAT, THE RESPONSE WASN'T ANYTHING ABOUT THE LANGUAGE OF THE
10:00AM 21 RULE, THE RESPONSE WAS, WELL, YOUR HONOR, WE GIVE THEM OUR
10:01AM 22 302'S, AND IF WE DIDN'T, THE DEFENSE WOULD BE VERY UPSET.

10:01AM 23 AND TO THAT, I HAVE A COUPLE OF RESPONSES.

10:01AM 24 ONE, IS THAT THE GOVERNMENT DOES GIVE US THEIR 302'S, AND,
10:01AM 25 TWO, YES, IF THEY STOPPED, WE WOULD BE VERY UPSET.

1 BUT THE REASON THEY GIVE US THE 302'S IS NOT BECAUSE OF
2 RULE 26.2, IT'S BECAUSE OF RULE 16 AND BRADY. AND AS WE
3 POINTED OUT IN OPPOSITION TO THE GOVERNMENT'S MIL NUMBER 14,
4 AND AS THE COURT -- AS THE GOVERNMENT NEVER ACTUALLY RESPONDED
5 TO DURING THE ARGUMENT ON THAT MOTION, THE GOVERNMENT AND THE
6 DEFENSE HAVE RECIPROCAL DISCOVERY OBLIGATIONS, BUT THEY DON'T
7 HAVE IDENTICAL OBLIGATIONS.

8 THE DEFENSE'S OBLIGATION UNDER RULE 16 IS TO PRODUCE
9 MATERIALS THAT WE INTEND TO INTRODUCE IN OUR CASE-IN-CHIEF.

10 THE GOVERNMENT HAS THAT SAME OBLIGATION, BUT THEY ALSO
11 HAVE TO PROVIDE INFORMATION THAT IS MATERIAL TO PREPARING A
12 DEFENSE, WHICH I THINK 302'S WOULD QUITE EASILY FALL, AND THEY
13 HAVE INDEPENDENT CONSTITUTIONAL OBLIGATIONS UNDER GIGLIO AND
14 BRADY TO PROVIDE OTHER MATERIAL.

15 AND THERE IS ALSO THE OTHER PIECE THAT THE GOVERNMENT
16 HASN'T SEEMED TO HAVE RESPONDED TO, TO MY KNOWLEDGE, WHICH IS
17 RULE 16(B) (2) (B). I KNOW, THAT'S A LOT OF SUBSECTIONS.

18 BUT THE LANGUAGE THERE SAYS THAT STATEMENTS THAT ARE MADE
19 TO THE DEFENDANT OR A DEFENSE ATTORNEY ARE EXCLUDED FROM THOSE
20 STATEMENTS THAT HAVE TO BE INTRODUCED. AND I'M HAPPY TO GO
21 THROUGH IN DETAIL HOW THAT WORKS, BUT I JUST WANT TO RAISE THE
22 POINT THAT I THINK WE HAVE COMPLIED WITH OUR DISCOVERY
23 OBLIGATIONS.

24 THE COURT: OKAY. SO WHAT YOU'RE TELLING ME THIS
25 MORNING IS THAT YOU HAVE -- YOU'VE COMPLIED, YOU HAVE NOTHING

10:02AM 1 ELSE TO GIVE AS OF 10:00 A.M.?

10:02AM 2 MR. BRECHER: I'LL CHAT WITH MY TEAM, BUT YES.

10:02AM 3 THE COURT: OKAY. ALL RIGHT.

10:02AM 4 MS. VOLKAR: YOUR HONOR, I FIND THAT VERY HARD TO
10:02AM 5 BELIEVE FOR MANY REASONS, BUT THE MOST OBVIOUS ONE OF WHICH IS
10:02AM 6 THAT THE DEFENSE IDENTIFIED OR DISCLOSED THREE EXPERT
10:02AM 7 WITNESSES.

10:02AM 8 IN ONE, WE RECEIVED A DECLARATION FROM MR. SONNIER THAT
10:02AM 9 HAS HIS COMPENSATION LEVEL. WE HAVE NOT SEEN ANY CONTRACTS,
10:02AM 10 INVOICES, STATEMENTS THAT I WOULD EXPECT TO HAVE BEEN GENERATED
10:02AM 11 FOR THESE OTHER TWO RETAINED EXPERTS AT THE VERY LEAST, LET
10:03AM 12 ALONE STATEMENTS OF INTERVIEWS WITH THE DEFENDANTS.

10:03AM 13 AND WE KNOW, FOR EXAMPLE, THAT THEY MET WITH DR. WOOTEN.
10:03AM 14 WHAT WE DON'T KNOW IS WHETHER THEY WROTE ANYTHING DOWN. AND
10:03AM 15 THE PART THAT MR. BRECHER LEFT OUT FROM THE COLLOQUY WITH
10:03AM 16 MS. SAHARIA, WAS WHEN YOUR HONOR, I THINK CHUCKLING, SAID TO
10:03AM 17 MS. SAHARIA, I GUESS YOU CAN MEET WITH SOMEONE AND JUST NEVER
10:03AM 18 TAKE ANY NOTES AND NEVER WRITE ANYTHING DOWN, AND THAT'S ONE
10:03AM 19 WAY TO GET AROUND YOUR DISCOVERY OBLIGATIONS, AND CLEARLY THE
10:03AM 20 DEFENSE HAS PICKED UP ON THAT.

10:03AM 21 BUT REGARDLESS, WHATEVER DOES EXIST -- AND WE KNOW THEY
10:03AM 22 ARE MEETING WITH PEOPLE. I'M GLAD THAT THEY THINK THE
10:03AM 23 GOVERNMENT HAS BEEN OVERDISCLOSING AND MEETING OUR DISCOVERY
10:03AM 24 OBLIGATIONS TO THEM. WE UNDERSTAND THEM.

10:03AM 25 WE'RE JUST SAYING THAT, ESPECIALLY WHEN ON THE OTHER SIDE

10:03AM 1 THEY APPARENTLY THINK THAT THEY DON'T NEED TO SHARE -- I WAS
10:03AM 2 GOING TO SAY ANYTHING, BUT THEY DID, OF COURSE, PRODUCE A
10:03AM 3 THOUSAND PAGES OF SECRET SERVICE BEST PRACTICES MANUALS AND
10:03AM 4 SEVERAL OTHER GOVERNMENT MANUALS IN DISCOVERY. SO THEY DID
10:03AM 5 PRODUCE SOMETHING. I'M NOT SAYING THAT THEY DIDN'T PRODUCE
10:03AM 6 ANYTHING.

10:03AM 7 BUT TO SAY THAT THERE'S NO WRITTEN MATERIALS PARTICULARLY
10:03AM 8 FOR THOSE OTHER TWO DISCLOSED EXPERTS, I FIND VERY DIFFICULT TO
10:04AM 9 BELIEVE.

10:04AM 10 THE COURT: DO YOU WANT TO COMMENT ON THE EXPERTS?

10:04AM 11 MR. BRECHER: YES, VERY MUCH SO, YOUR HONOR.

10:04AM 12 FIRST OF ALL, CONTRACTS AND INVOICES ARE, SO FAR AS I CAN
10:04AM 13 TELL, NOT STATEMENTS UNDER RULE 26.2. I DON'T SEE HOW THEY
10:04AM 14 COULD BE.

10:04AM 15 WE KNOW WHAT THE WORD "STATEMENT" MEANS. IN THE CONTEXT
10:04AM 16 OF RULE 801, FOR EXAMPLE, IT EXPRESSLY EXCLUDES DOCUMENTS THAT
10:04AM 17 SET LEGAL OBLIGATIONS BETWEEN PARTIES. SO THAT WOULD INCLUDE
10:04AM 18 CONTRACTS.

10:04AM 19 WE ALSO KNOW IN THE CONTEXT OF RULE 16 WHAT A STATEMENT
10:04AM 20 IS. STATEMENTS EXPRESSLY EXCLUDE THINGS LIKE CONTRACT.
10:04AM 21 THERE'S CASE LAW TO THAT EFFECT.

10:04AM 22 I'M NOT AWARE OF ANY CASE LAW CONSTRUING RULE 26.2, AND I
10:04AM 23 DIDN'T HEAR MS. VOLKAR CITING ANY THAT SUGGEST THAT THEY FALL
10:04AM 24 WITHIN THE MEANING OF DISCLOSABLE MATERIALS.

10:04AM 25 WHAT I WILL SAY, YOUR HONOR, IS THAT I DON'T HAVE

10:04AM 1 PARTICULAR -- EXCUSE ME, I DON'T HAVE PARTICULAR HEARTBURN
10:04AM 2 ABOUT DISCLOSING CONTRACTS AND INVOICES IN ANY SORT OF INHERENT
10:04AM 3 WAY, BUT MY CONCERN IS TWOFOLD.

10:04AM 4 ONE, I DON'T THINK IT'S REQUIRED UNDER THE LANGUAGE OF THE
10:05AM 5 RULE OR ANY AUTHORITY CONSTRUING THE RULES. SO I DON'T KNOW
10:05AM 6 WHY THE DEFENSE SHOULD HAVE TO DO SOMETHING THAT IS NOT
10:05AM 7 REQUIRED.

10:05AM 8 AND, TWO, WHAT I DON'T WANT TO SEE HAPPEN, IS TO SEE ANY
10:05AM 9 DISCLOSURE THAT THE DEFENSE MAY MAKE CONSTRUED AS SOME SORT OF
10:05AM 10 WAIVER OF OUR RIGHT TO REST ON THE LANGUAGE OF 26.2 AND THE
10:05AM 11 LANGUAGE OF RULE 16(B) (2) (B) .

10:05AM 12 AND A COUPLE OF POINTS, YOUR HONOR.

10:05AM 13 YES, THE COURT DID MAKE THAT OBSERVATION WITH MS. SAHARIA,
10:05AM 14 BUT THE COURT NEVER RULED, AND CONSISTENT WITH THE LANGUAGE OF
10:05AM 15 RULE 26.2(F), COULD NOT RULE THAT ATTORNEY'S NOTES OR
10:05AM 16 ATTORNEY'S SUMMARIES ARE STATEMENTS WITHIN THE MEANING OF
10:05AM 17 26.2(F) .

10:05AM 18 I DON'T THINK, GIVEN OUR PENDING MOTION FOR DISCOVERY,
10:05AM 19 WHICH WE STILL REALLY DO CARE ABOUT, THAT WE ACKNOWLEDGE THAT
10:05AM 20 THE GOVERNMENT WAS OVERDISCLOSING MATERIAL.

10:05AM 21 WHAT I DID SAY IS THAT THE GOVERNMENT HAS OTHER
10:05AM 22 INDEPENDENT DISCLOSURE OBLIGATIONS THAT THE DEFENSE DOES NOT
10:05AM 23 SHARE.

10:05AM 24 AND, SECOND, I'VE HEARD NO RESPONSE TO THE POINT UNDER
10:06AM 25 RULE 16(B) (2) (B) THAT STATEMENTS MADE TO DEFENSE COUNSEL ARE

10:06AM 1 NOT DISCLOSABLE.

10:06AM 2 THE COURT: IS THE COMPENSATION, IF ANY,
10:06AM 3 DISCLOSABLE?

10:06AM 4 MR. BRECHER: SO THAT'S THE ISSUE, YOUR HONOR. I
10:06AM 5 DON'T THINK THOSE ARE STATEMENTS WITHIN THE MEANING OF 26.2.

10:06AM 6 AS I SAID, I'M NOT, AS I SIT HERE, DEEPLY CONCERNED ABOUT
10:06AM 7 SHARING THAT INFORMATION. I GUESS WE COULD SHARE IT.

10:06AM 8 BUT MY WORRY IS, WHAT ARE WE OPENING THE DOOR TO IF WE
10:06AM 9 START SHARING INFORMATION THAT I DON'T THINK IS CALLED FOR BY
10:06AM 10 THE RULES?

10:06AM 11 IS THE GOVERNMENT GOING TO TURN THAT AROUND ON US AND SAY,
10:06AM 12 WELL, NOW YOU'VE OPENED THE DOOR AND WE'RE ENTITLED TO
10:06AM 13 EVERYTHING AND YOU CAN'T RAISE A DEFENSE.

10:06AM 14 THE COURT: SO THE GOVERNMENT CAN ASK THE WITNESS
10:06AM 15 THEN, WHAT IS YOUR COMPENSATION, AND THE WITNESS COULD TESTIFY
10:06AM 16 ABOUT THAT?

10:06AM 17 MR. BRECHER: YES.

10:06AM 18 AND I THINK, YOUR HONOR, IT'S TYPICAL PRACTICE. I CAN'T
10:06AM 19 SPEAK FOR MY COLLEAGUES, BUT IT'S ALWAYS BEEN MY PRACTICE, WHEN
10:06AM 20 QUALIFYING AN EXPERT, TO ASK DURING THE COLLOQUY, ARE YOU BEING
10:06AM 21 COMPENSATED? WHAT IS THAT COMPENSATION? DOES IT AFFECT YOUR
10:07AM 22 OPINIONS TODAY, ET CETERA?

10:07AM 23 THE COURT: OKAY.

10:07AM 24 MS. VOLKAR: YOUR HONOR, TWO MORE POINTS I DIDN'T
10:07AM 25 HAVE A CHANCE TO MAKE THE LAST TIME I HAD THE MIKE. ONE WAS

1 RELATED TO THE 16(B) (2) (B) .

2 I THINK THAT THAT'S PARTICULARLY INTERESTING THAT THE
3 DEFENSE IS RELYING SO HEAVILY ON THAT WHEN THEY WANT TO
4 IGNORE -- AND I'M SORRY I DON'T HAVE IT AT MY FINGERTIPS -- BUT
5 RULE 16(A) (2), WHICH IS ONE OF THE CORE BASES FOR OUR
6 OPPOSITION TO THEIR DISCOVERY MOTION, WHICH IS THE WORK PRODUCT
7 OF PROSECUTORS. THEY, OF COURSE, WANT TO SAY WE WAIVED THAT
8 AND AT THE VERY TOP OF OUR BRADY LETTER WE SAY "WITHOUT WAIVING
9 ANY PRIVILEGES."

10 SO ALL OF THE BENEFITS THAT MR. BRECHER WANTS HERE,
11 THEY'RE NOT WILLING TO AFFORD TO THE GOVERNMENT IN TURN.

12 AND THE LAST THING THAT I WANT TO SAY, AND I HESITATE
13 BECAUSE I DON'T WANT TO REOPEN THE DOOR, BUT WHEN YOUR HONOR
14 ASKED, "IF YOU ARE GOING TO SAY TO MR. SONNIER 'WHY DIDN'T THE
15 GOVERNMENT DO THIS?' CAN'T THE GOVERNMENT RESPOND THAT THEY
16 DIDN'T HAVE THE REAL THING?'"

17 WE WOULD ALSO SAY THAT THE GOVERNMENT SHOULD BE ABLE TO
18 RESPOND WHY DIDN'T WE GET OR FOCUS MORE ON GETTING THE
19 FUNCTIONING COPY OF THE LIS? BECAUSE WE KNEW THERANOS VOIDED
20 ALL OF THE TEST RESULTS, BECAUSE WE HAD DR. DAS, BECAUSE WE HAD
21 ALL OF THE STUFF FROM CMS.

22 THERE IS A LOT OF OTHER INFORMATION OUT THERE AS WELL THAT
23 THE GOVERNMENT HAD IN ITS POSSESSION AT THE SAME TIME IT
24 COLLECTED WHAT IT THOUGHT WAS A WORKING COPY OF THE LIS.

25 AND I KNOW WE'RE NOT ARGUING THE FACTS, BUT I DON'T WANT

10:08AM 1 TO GET AWAY FROM THE EMPLOYEE OF THE GOVERNMENT THAT THEY KEEP
10:08AM 2 POINTING TO, THE FOUR OPTIONS, THE GOVERNMENT FOLLOWED TWO OF
10:08AM 3 THEM, ONE BEING A PERFECTLY REASONABLE ONE, WHICH WAS TO ASK
10:08AM 4 THERANOS TO GIVE -- OR THE ASSIGNEE FOR THERANOS TO GIVE A
10:08AM 5 WORKING COPY. SO I JUST DON'T WANT TO LET THAT VERY BASIC FACT
10:08AM 6 GO.

10:08AM 7 MR. BRECHER: BRIEFLY, YOUR HONOR.

10:08AM 8 FIRST, ON THE WORK PRODUCT ISSUE. WHEN YOU SEND A LETTER
10:08AM 9 DESCRIBING THE CONTENTS OF SOMETHING TO AN OPPOSING PARTY, YOU
10:08AM 10 HAVE BY DEFINITION SUBSTANTIALLY RAISED THE ODDS OF YOUR
10:08AM 11 OPPONENT LEARNING OF THAT INFORMATION. THAT IS A WORK PRODUCT
10:08AM 12 WAIVER.

10:09AM 13 SECOND, I WANT TO RESPOND TO RETURN TO THE THEME OF THE
10:09AM 14 GOVERNMENT'S PROPOSED REBUTTAL CASE. THAT IS THE WORST KIND OF
10:09AM 15 BOOTSTRAPPING. IT'S COMPLETELY IRRELEVANT. AND, INDEED,
10:09AM 16 DR. DAS WAS NOT INTERVIEWED BY THE GOVERNMENT UNTIL 2021.

10:09AM 17 SO THE NOTION THAT THEY WERE RELYING ON HIS CONCLUSIONS IN
10:09AM 18 MAKING A DECISION IN 2018, THAT MAKES NO SENSE.

10:09AM 19 THE COURT: OKAY. WELL, THANK YOU VERY MUCH FOR THE
10:09AM 20 CONVERSATION THIS MORNING. THE MATTER WILL BE UNDER
10:09AM 21 SUBMISSION.

10:09AM 22 WE'RE NEXT TOGETHER, I THINK, FRIDAY. AND YOU HAVE A
10:09AM 23 WITNESS TO CALL FRIDAY?

10:09AM 24 MR. BRECHER: WELL, WE DO, YOUR HONOR.

10:09AM 25 WELL, I'LL ALLOW MR. COOPERSMITH TO SPEAK.

10:09AM 1 THE ISSUE IS, YOUR HONOR, WE HAVE DISCLOSED MR. SONNIER AS
10:09AM 2 ONE OF OUR WITNESSES FOR FRIDAY. I CERTAINLY DON'T WANT TO
10:09AM 3 RUSH THE COURT'S DECISION, BUT I'LL JUST FLAG THAT THAT IS OUR
10:09AM 4 PRESENT INTENTION. WE KNOW THAT WE'LL NEED THE COURT'S LEAVE.
10:09AM 5 WE KNOW AT LEAST IN THEORY WE'LL NEED A DECISION ON THE
10:10AM 6 DISCOVERY MOTION, AND WE HOPE THAT OUR CLIENT AND OUR EXPERT
10:10AM 7 CAN REVIEW THOSE MATERIALS IF THEY WILL BE FORTHCOMING IN TIME
10:10AM 8 FOR US TO ASSESS BOTH WHETHER TO CALL THAT WITNESS AND WHETHER
10:10AM 9 TO PRESENT THIS DEFENSE, BECAUSE IT MAY BE RELEVANT.

10:10AM 10 THE COURT: DO YOU HAVE OTHER WITNESSES THAT YOU
10:10AM 11 COULD CALL IN THE INTERIM?

10:10AM 12 MR. BRECHER: I'LL DEFER TO MY COLLEAGUE ON THAT,
10:10AM 13 YOUR HONOR.

10:10AM 14 THE COURT: I'M TALKING ABOUT FRIDAY.

10:10AM 15 MR. BRECHER: YES.

10:10AM 16 MR. COOPERSMITH: THANK YOU, YOUR HONOR. YES, I
10:10AM 17 UNDERSTAND THE QUESTION.

10:10AM 18 WE HAVE DISCLOSED TO THE GOVERNMENT OTHER WITNESSES THAT
10:10AM 19 WE WOULD CALL ON FRIDAY, AND IT'S NO SECRET TO THE GOVERNMENT,
10:10AM 20 SO I DON'T MIND TELLING THE COURT EITHER.

10:10AM 21 IT'S ALSO ANOTHER EXPERT WE HAVE NOTICED, A MR. WEINGUST.
10:10AM 22 HIS TESTIMONY WOULD BE REGARDING THE VALUATION OF THERANOS'S
10:10AM 23 INTELLECTUAL PROPERTY AS OF THE TIME THAT MR. BALWANI LEFT THE
10:10AM 24 COMPANY. WE HAVEN'T HEARD ANYTHING FROM THE GOVERNMENT
10:10AM 25 OBJECTING TO THAT, BUT WE WOULD PLAN TO DO THAT.

1 WE ALSO HAVE SOME CUSTODIAN WITNESSES.

2 WE ARE -- WE HAVE SOME EMAILS OUT TO THE PROSECUTION TEAM.

3 I'M NOT SURE THEY'VE HAD A CHANCE TO RESPOND, BUT WE MIGHT TRY
4 TO GET STIPULATIONS TO AVOID FLYING CUSTODIANS ACROSS THE
5 COUNTRY OR FROM OTHER PLACES FOR TEN MINUTE TESTIMONY. WE'LL
6 SEE WHAT HAPPENS THERE.

7 AND THEN WE'LL HAVE TO, AT SOME POINT, MAKE A DECISION
8 ABOUT WHETHER MR. BALWANI IS GOING TO TESTIFY OR NOT.

9 I DON'T KNOW WHETHER THE WITNESSES THAT WE HAVE NOTICED
10 FOR FRIDAY -- OBVIOUSLY SOME OF IT DEPENDS ON THE COURT'S
11 RULING ON THE MATTER THAT WE JUST DISCUSSED.

12 THE COURT: SURE.

13 MR. COOPERSMITH: GO AHEAD, YOUR HONOR. I'M SORRY.

14 THE COURT: THANK YOU. PARDON ME.

15 I'M LOOKING AT OUR SCHEDULE, AND IT'S TRUNCATED, ISN'T IT?
16 WE HAVE FRIDAY AND THEN WE HAVE A WEEK OFF.

17 MR. COOPERSMITH: YES, YOUR HONOR.

18 THE COURT: AND IT -- MY SENSE IS THAT IF YOUR
19 EXPERT SONNIER WERE TO TESTIFY, HIS TESTIMONY WOULD NOT
20 COMPLETE IN ANY EVENT ON FRIDAY.

21 MR. COOPERSMITH: WELL, I DON'T KNOW WHAT THE CROSS
22 IS, AS USUAL, BUT I DON'T THINK THE TESTIMONY WE WOULD OFFER
23 THROUGH MR. SONNIER WOULD TAKE INORDINATELY LONG. I THINK
24 MR. BRECHER'S ESTIMATE WAS TWO HOURS. I THINK IT MIGHT BE EVEN
25 LESS THAN THAT.

10:12AM 1 SO I DON'T THINK THAT THAT FILLS THE DAY. WE HAVE THAT
10:12AM 2 OTHER EXPERT, MR. WEINGUST, WHO MIGHT FILL MORE OF THE DAY.

10:12AM 3 AND THEN I THINK, YOU KNOW, GIVEN THAT WE ONLY HAVE THE
10:12AM 4 ONE DAY, IF WE'RE AT A POINT WHERE WE HAVE TO DECIDE, WELL, WE
10:12AM 5 DON'T HAVE ANY MORE WITNESSES EXCEPT FOR THESE CUSTODIANS WHO
10:12AM 6 MAY NOT EVEN HAVE TO TESTIFY IF WE'RE ABLE TO REACH SOME
10:12AM 7 AGREEMENT WITH THE GOVERNMENT, THEN WE WOULD HAVE SOME TIME IN
10:12AM 8 THE AFTERNOON WHERE EITHER WE WOULD HAVE TO BREAK FOR THE DAY,
10:12AM 9 IF YOUR HONOR WANTED TO DO THAT, OR WE WOULD HAVE TO CALL
10:12AM 10 ANOTHER WITNESS. AND THE ONLY OTHER WITNESS WE MIGHT HAVE AT
10:12AM 11 SOME POINT IS MR. BALWANI.

10:12AM 12 THE COURT: WELL, I DON'T WANT YOU TO TELL ME ABOUT
10:12AM 13 ANY OF THAT. I'M NOT ASKING YOU TO REVEAL ANYTHING LIKE THAT.

10:12AM 14 MR. COOPERSMITH: YES, YOUR HONOR.

10:12AM 15 THE COURT: I DO RECOGNIZE THAT YOU WILL, AS YOU
10:12AM 16 TOLD ME, YOU'LL HAVE TO MAKE SOME DECISIONS, REVIEW WHAT IS
10:13AM 17 DISCOVERABLE, WHAT IS NOT, LOOK AT IT, AND MAKE A DECISION AS
10:13AM 18 TO WHAT NEXT STEPS ARE, INCLUDING WHETHER OR NOT YOU WANT TO
10:13AM 19 CALL YOUR EXPERT.

10:13AM 20 MR. COOPERSMITH: YES, YOUR HONOR.

10:13AM 21 THE COURT: AND YOU -- YOU KNOW, YOU NEED SOME TIME
10:13AM 22 TO DO THAT.

10:13AM 23 MR. COOPERSMITH: AND, YOUR HONOR, IF I FOLLOW THE
10:13AM 24 POINT I'M HOPING I'M GETTING AT, IS THAT WE HAVE A VERY -- YOU
10:13AM 25 KNOW, IT'S NOW MONDAY OBVIOUSLY. AND EVEN THOUGH FRIDAY IS AT

1 THE END OF THE WEEK, THERE'S A LOT TO ACCOMPLISH. I KNOW THE
2 COURT HAS SOME ISSUES TO CONSIDER AND TO BE THOUGHTFUL ABOUT
3 HOW YOU APPROACH THOSE.

4 WE ALSO HAVE THINGS THAT WE HAVE TO TALK ABOUT WITH THE
5 GOVERNMENT. THERE'S ANOTHER EXPERT. WE MAY HAVE SOME OTHER
6 MOTIONS WE HAVE TO FILE ABOUT SOME OTHER THINGS.

7 AND SO IT WOULD BE PERHAPS WISE TO GIVE EVERYONE MORE TIME
8 TO SORT OF GET EVERYONE'S ARMS AROUND THIS, TO NOT HAVE A
9 SESSION OR AS LONG A SESSION ON FRIDAY AND TO USE THAT TIME FOR
10 OTHER PURPOSES.

11 I MEAN, FOR EXAMPLE, WE'RE HAPPY TO BEGIN THE PROCESS OF
12 DISCUSSING JURY INSTRUCTIONS. THERE ARE OTHER THINGS TO
13 ACCOMPLISH. OBVIOUSLY, THIS IS ALL UP TO YOUR HONOR.

14 IF I FOLLOW THE COURT, THAT MIGHT BE ONE WAY TO APPROACH
15 THIS.

16 THE COURT: WELL, I WAS CURIOUS -- WELL, THANK YOU.
17 I WAS CURIOUS ABOUT WHETHER OR NOT YOU COULD PUT ANY OF YOUR
18 WITNESSES ON, AS AN ALTERNATIVE TO MR. SONNIER, FRIDAY?

19 MR. COOPERSMITH: RIGHT.

20 THE COURT: AND I DON'T WANT TO DISRUPT YOUR CASE
21 STRATEGY OR ANYTHING YOU WANT TO PUT ON. I RECOGNIZE THAT.

22 MR. COOPERSMITH: I APPRECIATE THAT, YOUR HONOR. I
23 DON'T REALLY MIND IF WE HAD TO CALL OTHER WITNESSES AND GIVE
24 THE COURT MORE TIME. THE PROBLEM IS THAT I DON'T THINK WE
25 WOULD HAVE ENOUGH WITNESSES TO FILL THE DAY, UNLESS WE MADE A

10:14AM 1 DECISION TO CALL MR. BALWANI, WHICH I CAN'T -- I DON'T KNOW
10:14AM 2 YET, RIGHT?

10:14AM 3 THE COURT: RIGHT. OKAY.

10:14AM 4 MR. SCHENK.

10:14AM 5 MR. SCHENK: THANK YOU, YOUR HONOR.

10:14AM 6 I RISE JUST TO SPEAK ON THE SCHEDULING ISSUES THAT THE
10:14AM 7 COURT IS NOW DISCUSSING.

10:14AM 8 I THINK THE GOVERNMENT'S VIEW IS WE NEED TO TAKE ADVANTAGE
10:14AM 9 OF THE DAYS THAT WE HAVE. WE IMPANELLED THE JURY THE BEGINNING
10:15AM 10 OF MARCH, AND WE GAVE THEM A TRIAL ESTIMATE OF A CERTAIN NUMBER
10:15AM 11 OF WEEKS, AND WE HAVE SINCE GIVEN THEM AN OPPORTUNITY TO OFFER
10:15AM 12 TO US ADDITIONAL DAYS THAT THEY COULD ADD TWO WEEKS.

10:15AM 13 AND AS THE COURT HAS SEEN, THIS JURY HAS BEEN PRETTY
10:15AM 14 RESISTANT -- OR AT LEAST SOME OF THE MEMBERS OF THE JURY, TO BE
10:15AM 15 FAIR. I THINK MANY OF THEM HAVE BEEN AVAILABLE TO ADD DAYS,
10:15AM 16 BUT WE HAVE NOT BEEN ABLE TO GET THE FULL PANEL WILLING TO ADD
10:15AM 17 DAYS.

10:15AM 18 AND WE SAW HEALTH ISSUES COME UP IN OUR LAST WEEK OF
10:15AM 19 TRIAL. MORE THAN ONE DAY WE SPENT AN ALTERNATE.

10:15AM 20 AND THE GOVERNMENT'S VIEW REALLY IS THAT THE COURT HAS SET
10:15AM 21 ASIDE AND FOR A LONG TIME INFORMED THIS JURY THAT THIS FRIDAY
10:15AM 22 WAS GOING TO BE A TRIAL DAY.

10:15AM 23 I ASSUMED THAT CAUSED THIS JURY TO MAKE OR ADJUST TRAVEL
10:15AM 24 PLANS. THIS COMING WEEKEND IS A HOLIDAY WEEKEND, AND WE TOLD
10:15AM 25 THEM THAT FRIDAY WAS A TRIAL DAY. I THINK FRIDAY SHOULD REMAIN

10:16AM 1 A TRIAL DAY.

10:16AM 2 AND I APPRECIATE THAT THERE IS WORK THAT NEEDS TO BE DONE
10:16AM 3 WITH REGARD TO MR. SONNIER AND THE ADMISSIBILITY OF CERTAIN
10:16AM 4 TESTIMONY, BUT IF THE DEFENSE NEEDS TO REVISE THEIR WITNESS
10:16AM 5 LIST THAT THEY PROVIDED US TO COVER FRIDAY, THEY SHOULD DO THAT
10:16AM 6 IMMEDIATELY. AND I THINK IT'S OUR EXPECTATION THAT WE'RE GOING
10:16AM 7 TO BE HERE FOR A FULL DAY ON FRIDAY.

10:16AM 8 THE COURT: WELL, THANK YOU.

10:16AM 9 I'D LIKE TO HAVE TESTIMONY FRIDAY IF WE CAN. I'D LIKE TO
10:16AM 10 DO THAT.

10:16AM 11 THIS WEEK IS -- I THINK I TOLD YOU, I HAVE NINTH CIRCUIT
10:16AM 12 COMMITTEE OBLIGATIONS TOMORROW AND WEDNESDAY. SO THE COURT --
10:16AM 13 I WON'T BE HERE. I'LL BE IN SAN DIEGO.

10:16AM 14 THURSDAY I HAVE A CIVIL CALENDAR. AS YOU KNOW, WE'RE
10:16AM 15 TYPICALLY DARK ON THURSDAYS BECAUSE OF OUR CIVIL CALENDAR. SO
10:16AM 16 IT PUTS SOME, SOME PRESSURE ON THE COURT TO GET YOU THE
10:16AM 17 INFORMATION THAT YOU NEED, AND THAT'S WHY I SCHEDULED THIS,
10:17AM 18 THIS MORNING AT 8:30 SO WE COULD CAPTURE SOME TIME, AND I MOVED
10:17AM 19 SOME CASES SO WE COULD DO THE BEST WE CAN TO KEEP THINGS GOING.

10:17AM 20 SO I WOULD LIKE TO HAVE SOME TESTIMONY ON FRIDAY, AT LEAST
10:17AM 21 AS MANY WITNESSES AS YOU THINK YOU CAN ACCOMPLISH.

10:17AM 22 MR. COOPERSMITH: YES, YOUR HONOR. I THINK WE COULD
10:17AM 23 CALL OTHER WITNESSES. I MENTIONED MR. WEINGUST, POSSIBLY SOME
10:17AM 24 CUSTODIANS DEPENDING ON HOW THAT GOES.

10:17AM 25 THE COURT: SURE.

10:17AM 1 MR. COOPERSMITH: AND THEN WE'LL -- MR. SCHENK IS
10:17AM 2 RIGHT, IF WE HAVE TO REVISE THE WITNESS LIST, WE WILL DO SO AT
10:17AM 3 THE EARLIEST POSSIBLE OPPORTUNITY.

10:17AM 4 BUT WITH REGARD TO MR. SONNIER, THERE ARE SOME ISSUES.
10:17AM 5 THERE'S THE DISCOVERY ISSUE THAT IS PENDING. AND OBVIOUSLY IF
10:17AM 6 THAT DISCOVERY IS ALLOWED AND WE RECEIVE THE UNDERLYING EMAILS,
10:17AM 7 THEN THAT'S SOMETHING THAT MR. SONNIER WOULD HAVE TO REVIEW, WE
10:17AM 8 WOULD HAVE TO SORT OF ADJUST THINGS.

10:17AM 9 WE CAN CALL WITNESSES OTHER THAN MR. SONNIER. BUT WHAT WE
10:17AM 10 DON'T WANT TO BE IN A POSITION OF -- WE WANT TO PUT ON OUR
10:17AM 11 DEFENSE AS WE'RE ALLOWED TO PRESENT IT, AND WE DON'T THINK THAT
10:18AM 12 IT WOULD BE FAIR TO PUT US IN A POSITION WHERE THE ONLY WITNESS
10:18AM 13 WE COULD CALL, YOU KNOW, IS OUR CLIENT, AND WE HAVEN'T MADE
10:18AM 14 THAT DECISION.

10:18AM 15 SO WE WOULD PUT ON AS MANY OTHER WITNESSES THAT WE COULD,
10:18AM 16 AND IF WE COULDN'T CALL MR. SONNIER BECAUSE THE COURT HASN'T
10:18AM 17 REACHED A DECISION OR WE JUST DON'T HAVE ENOUGH TIME TO PREPARE
10:18AM 18 HIM, WE WOULD HOPE THAT THE COURT WOULD GIVE US SOME INDULGENCE
10:18AM 19 TO JUST, YOU KNOW, NOT FILL THE WHOLE DAY FRIDAY RATHER THAN
10:18AM 20 START --

10:18AM 21 THE COURT: RIGHT. THAT'S WHERE I WAS GOING AS
10:18AM 22 WELL.

10:18AM 23 JUST BECAUSE OF THE TIME CRUNCH OF ALL OF THIS, YOU KNOW,
10:18AM 24 ALL OF US WOULD BE GRATEFUL IF THE DEFENSE FEELS THAT YOU COULD
10:18AM 25 CALL ALTERNATIVE WITNESSES ON FRIDAY, WE'LL GET THROUGH AS MANY

10:18AM 1 AS WE CAN.

10:18AM 2 I DON'T THINK OUR JURY WOULD OBJECT TO BEING RELEASED
10:18AM 3 EARLY ON A FRIDAY BEFORE A THREE DAY WEEKEND HOLIDAY.

10:18AM 4 MR. COOPERSMITH: YES, YOUR HONOR.

10:18AM 5 THE COURT: AND THAT NEXT WEEK WE'RE DARK, AND THAT
10:18AM 6 WOULD GIVE THE DEFENSE TIME TO DIGEST THE COURT'S RULING AND DO
10:18AM 7 WHATEVER YOU NEED TO DO SUCH THAT YOU'LL MAKE DECISIONS ON
10:18AM 8 WITNESSES GOING FORWARD.

10:19AM 9 MR. COOPERSMITH: YES, YOUR HONOR.

10:19AM 10 THE COURT: SO IT -- WE HAVE THAT BIG BREAK NEXT
10:19AM 11 WEEK, AND I'M PAUSING BECAUSE WE ALSO NEED TO SCHEDULE A
10:19AM 12 CHARGING CONFERENCE AT SOME POINT IN TIME.

10:19AM 13 MR. COOPERSMITH: YES, YOUR HONOR.

10:19AM 14 THE COURT: AND I'LL LOOK AT THAT AS WELL.

10:19AM 15 MR. COOPERSMITH: THANK YOU.

10:19AM 16 THE COURT: THANK YOU.

10:19AM 17 ANYTHING ELSE?

10:19AM 18 MR. BRECHER: NOTHING FROM THE DEFENSE, YOUR HONOR.

10:19AM 19 THE COURT: THANK YOU.

10:19AM 20 MR. SCHENK: YOUR HONOR, THERE IS ONE ISSUE.

10:19AM 21 THE COURT: MR. BOSTIC.

10:19AM 22 MR. BOSTIC: THANK YOU, YOUR HONOR. GOOD MORNING.

10:19AM 23 LAST NIGHT THE DEFENSE FILED AN ADDITIONAL MOTION THAT I
10:19AM 24 BELIEVE IS NOTICED FOR 11:30 TODAY.

10:19AM 25 I'M NOT SURE WHAT THE DEFENSE'S INTENTION OR THE COURT'S

1 PREFERENCES ARE WITH RESPECT TO THE SCHEDULING OF THAT MOTION.

2 WE PREVIOUSLY HAVE BEEN IN DISCUSSIONS ABOUT THE EXHIBIT
3 THAT THE DEFENSE IS SEEKING TO EXHIBIT. I HAVE HAD A CHANCE TO
4 REVIEW THE MOTION.

5 I THINK THAT THE PARTIES MIGHT BENEFIT FROM SOME
6 ADDITIONAL MEET AND CONFER TIME ON THAT.

7 IN SHORT, THE GOVERNMENT DOESN'T THINK IT WILL BE
8 NECESSARY TO CALL A DOCUMENT CUSTODIAN. I'VE CONVEYED THAT
9 PREVIOUSLY TO THE DEFENSE, BUT I'M NOT SURE WHETHER WE NEED TO
10 HAVE THAT ARGUMENT AT 11:30 OR WHETHER IT MIGHT MAKE SENSE TO
11 ALLOW THE PARTIES TO DISCUSS IT MORE. I DON'T THINK THAT'S
12 SOMETHING THAT WOULD NEED TO BE RESOLVED BEFORE FRIDAY, BUT I'M
13 CURIOUS ON THE COURT'S AND THE DEFENSE'S THOUGHTS.

14 THE COURT: RIGHT. THANK YOU.

15 AS YOU RECALL, AND AS NOTICED IN THE MOTION, THE COURT DID
16 NOT ADMIT THAT DOCUMENT BECAUSE IT WAS AN EXCEL SHEET THAT WAS
17 SOMEWHAT CUT UP, AND IT WAS DIFFICULT TO TRACK, NOT IMPOSSIBLE
18 BUT DIFFICULT.

19 AND I THINK THE WAY IT WOULD BE PRESENTED, IT WAS MULTIPLE
20 PAGES. THE JURY WOULD HAVE A DIFFICULT TIME LOOKING AT THAT.

21 YOU HAVE CORRECTED THAT I THINK.

22 MR. COOPERSMITH: YES, YOUR HONOR.

23 THE COURT: AND WHAT YOU OFFER NOW IS A SOLID ONE
24 PIECE. YOU CAN GO HORIZONTALLY ACROSS AND FILL IN ALL OF THE
25 AREAS.

10:21AM 1 MR. COOPERSMITH: YES, YOUR HONOR.

10:21AM 2 THE COURT: AND SO THAT'S THE ISSUE NOW I TAKE IT.

10:21AM 3 MR. COOPERSMITH: YES, YOUR HONOR.

10:21AM 4 AND IT'S VERY HELPFUL OF MR. BOSTIC TO SAY WE WOULDN'T
10:21AM 5 HAVE TO CALL A CUSTODIAN TO FLY SOMEONE UP HERE, SO WE CAN TELL
10:21AM 6 THAT PERSON, I'M SURE SHE'LL BE DELIGHTED, THAT SHE DOESN'T
10:21AM 7 HAVE TO COME TO COURT.

10:21AM 8 I DON'T KNOW IF THERE'S ANY REMAINING ISSUES AS TO THAT.

10:21AM 9 BUT WHEN WE NOTICED THE MOTION FOR 11:30 TODAY, WE WERE
10:21AM 10 NOT TRYING TO PUT PRESSURE ON THE COURT. WE ALWAYS SAY IN
10:21AM 11 THOSE, OBVIOUSLY IT'S AT SUCH TIME THAT THE COURT CAN TAKE UP,
10:21AM 12 EVEN IF IT'S NOT 11:30.

10:21AM 13 I'M HAPPY TO CONFER FURTHER WITH MR. BOSTIC, AND HOPEFULLY
10:21AM 14 WE CAN REACH SOME AGREEMENT ON THAT. AND IF NOT, THEN WE WILL
10:21AM 15 TAKE IT UP WITH YOUR HONOR WHEN YOUR HONOR IS AVAILABLE.

10:21AM 16 THE COURT: WE CAN TALK ABOUT THIS FRIDAY THEN. I
10:21AM 17 DON'T THINK THIS IS SOMETHING THAT YOU'RE GOING TO HAVE
10:21AM 18 TESTIMONY ON.

10:21AM 19 MR. COOPERSMITH: YES. THAT'S ABSOLUTELY FINE.

10:21AM 20 THE COURT: ALL RIGHT. THANK YOU.

10:21AM 21 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

10:22AM 22 MR. BOSTIC: THANK YOU, YOUR HONOR.

10:22AM 23 (COURT ADJOURNED AT 10:22 A.M.)

24

25

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

A handwritten signature in black ink that reads "Irene Rodriguez". The signature is written in a cursive, flowing style with a large, decorative flourish at the end of the last name.

IRENE RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074

DATED: MAY 23, 2022